<Articles> Pufendorf and International Law

著者（英）	Charles Edward COVELL
journal or publication title	The Tsukuba University Journal of Law and Politics
volume	32
page range	367-442
year	2002-03-29
URL	http://hdl.handle.net/2241/00156000

PUFENDORF AND INTERNATIONAL LAW

Charles Covell

Of the classic writers who are recognized to have contributed to the establishing of the modern system of the law of nations, there are few whose position in the tradition of international law it is harder to be clear about than that of the German jurist and political philosopher Samuel Pufendorf (1632-94). In one respect, Pufendorf's place in the tradition of international law is central. For the school in moral, legal and political thought to which Pufendorf belonged was the school of modern secular natural law, and the secular natural law thinkers played a major role in determining the form and substance of much of modern international law. The founder of the modern secular natural law school is generally held to be the Dutch jurist and political theorist Hugo Grotius (1583-1645), and Grotius it is who is widely regarded as the founder also of modern international law with his seminal works *De Jure Praedae Commentarius* (c. 1604) and *De Jure Belli ac Pacis Libri Tres* (1625).[1] Pufendorf was to bring together many, if not all, of Grotius' doctrines in an elaborate system of natural law jurisprudence, which was set out in the following works: *Elementorum Jurisprudentiae Universalis Libri Duo* (1660); *De Jure Naturae et Gentium Libri Octo* (1672); *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1673).[2] The system of natural law that Pufendorf expounded served to establish the conceptual framework for the classic expositions of the principles of the law of nations of the eighteenth cen-

tury, including the ones provided by the German philosopher Christian Wolff (1679-1754), as in his *Jus Gentium Methodo Scientifica Pertractatum* (1749), [3] and by the Swiss jurist Emer, or Emmerich, de Vattel (1714-67) in his *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758). [4]

From this it would appear that the claims made for Pufendorf as a central figure in the modern tradition of international law are more or less uncontestable. However, it remains the case that for all that Pufendorf was the successor to Grotius and for all that he looked forward to Wolff and Vattel, there are still crucial respects in which he must be viewed as having failed to establish an adequate concept of international law. Indeed, Pufendorf is in certain of his concerns to be placed together with the English political philosopher Thomas Hobbes (1588-1679), and Hobbes, it should be noted, is generally reckoned to be a writer who denied the reality of international law, rather than one who endorsed the claims of law as the basis for the regulation of the international order. [5]

The concern in the present paper is with detailed discussion of the contribution that Pufendorf made to the development of the modern tradition of international law, and to the development of the concept of law that is specific to this tradition. It is explained that Pufendorf saw what he took to be the first principles of natural law as comprising the substance of international law. Thus it is underlined that Pufendorf affirmed the reality of international law, in the respect that he affirmed that the law of nature had direct application to states and rulers in the sphere of their mutual external relations. At the same time, it is explained that the identification that Pufendorf made of natural law as the essence of international law was such that he came to fall short of the full realization of the concept of international law, and this particularly so with respect to

the determination of a concept of international law that properly accorded with the status of states and rulers as the subjects of international law. Despite this, it is still emphasized that the natural law approach that Pufendorf adopted in the understanding of international law was, and remains, virtuous in that it served to give recognition to the first-order principles that lie at the foundations of modern international law. The paper comprises four parts. In Part 1, Grotius is considered as a writer on international law, and with brief reference being made to Hobbes in relation to international law. The discussion of Grotius and Hobbes sets the context for the exposition in Part 2 of the principles of Pufendorf's natural law jurisprudence, as this relates to such matters as the natural rights and duties of men, the institution of the state, the rights and powers of sovereignty, civil law and the law of nations. In Part 3, the place that Pufendorf occupies in the tradition of international law is explained, and with particular reference to his affirming of certain foundational principles of modern international law and to the defects that remain in the concept of international law for which he argued. In Part 4, the defects of the concept of international law elaborated by Pufendorf are considered, as these present themselves for consideration through attention to the work of his successors Wolff and Vattel.

i. Grotius and Hobbes

The decisive contribution that Grotius made to the establishing of modern international law comes, first and foremost, in the exposition of the law of war and peace that he provided in *De Jure Belli ac Pacis*. In the event, the concern of Grotius in *De Jure Belli ac Pacis* did not lie exclusively with the law applying to the external rela-

tions between states and their rulers, and so with the subject-matters pertaining to international law proper. For the law of war and peace, as Grotius expounded it, served to identify the natural rights and obligations of men, as it served also to explain the origin and justification of the civil state, the basis and extent of the rights and powers of the state in respect of its subjects, and the basis and extent of the obligations of subjects in the condition of the state. Despite this, it has to be admitted that much the greater part of *De Jure Belli ac Pacis* was taken up with the exposition of the law of war and peace as it had application to states and rulers in their external relations with one another. Thus Grotius here addressed such matters as: the conditions for public war as waged by states on the authority of their rulers; the just causes for war; the lawful rights belonging to states such as were engaged in the waging of public war; the principles of good faith binding on states and their rulers, including the principles of good faith that states and rulers were required to conform with in order to conclude the condition of war and restore the condition of peace.

The law of war and peace, as Grotius saw it applying to states and rulers, was formed from various constituent elements or parts. Of the parts of the law of war and peace that Grotius identifed and made reference to, the two that were central in the argument of *De Jure Belli ac Pacis* were the law of nature, or *jus naturale*, and the positive, or voluntary, law of nations, or *ius gentium*.

As Grotius explained it, the law of nature was a law that was understood to have application to men considered as beings who acted, and who indeed were compelled to act, so as to secure the end of their own defence and self-preservation. Thus, for Grotius, the law of nature was a law of self-defence, or law of self-preservation, and it was in this sense of it that the law of nature served to ground a right that was foundational in the Grotian law

of war and peace. This was the right of men to wage private war: that is, the right of men to act, and where necessary to adopt the means of war, in order to defend and preserve themselves, and so secure their property and personal rights. [6] However, it was Grotius' view that the full securing by men of the end of their own defence and self-preservation, and that of the defence and preservation of their property and personal rights, involved not the exercise by men of the right of private war, but, rather, the participation of men in the specifically political form of society and their conformity with the fundamental principles of social order obtaining therein. Thus the law of nature was not only a law of self-preservation, but also, and primarily so, the law of social order. It was in this sense of it that Grotius held that the law of nature was grounded in the essential condition of human nature, in the respect that it was grounded in the natural inclination of men towards sociability. [7]

The principles of social order that Grotius saw as contained in the law of nature, as law grounded in the inclination of men to be sociable, were first-order principles of justice and morality. The latter, essentially, were principles that related to the requirements falling on men to respect one another in matters to do with their personal, property and contractual rights, to discharge the obligations which corresponded to these rights, and, where necessary, to inflict punishments on those who failed to respect the relevant rights or to discharge the relevant obligations. [8] The maintenance of social order based in the personal, property and contractual rights of men was something that, for Grotius, necessitated the institution of the state, where there would be present proper procedures for the making and enforcement of laws capable of giving determinate form and substance to the basic framework principles of social order. Thus did Grotius think of the law of nature as implying the necessity that men should establish states for their self-

government, and that men should maintain states and state institutions through subjecting themselves to the will and power of rulers and to the laws which were issued by rulers to give effect to their will and power. [9]

In the classification of the different forms of law that Grotius provided in *De Jure Belli ac Pacis*, the law of nature was explained as being a universal law of reason, in the sense that it embodied principles which were to be thought of as self-evident to men in their natural condition as rational beings. Thus Grotius defined the law of nature as a dictate of right reason, which served to determine the moral necessity, or moral baseness, of acts according to their agreement, or disagreement, with rational nature. [10] Standing in opposition to the law of nature, there was the sphere of law that was to be explained not as law based in rational nature, but as law which had its origins in the will. This was the sphere of law that Grotius termed volitional law, or *ius voluntarium*, with the form of volitional law that originated in the will and agency of men being the volitional human law, or *ius voluntarium humanum*. [11] One form of volitional human law was state law, or municipal law. This was the law that was brought into being and maintained through the civil power in the state. In contrast to municipal law, there was the positive or voluntary law of nations. The law of nations belonged to the sphere of volitional human law because it was law which originated in, and which derived its binding normative force from, the will of nations. As for the evidence for the law of nations, considered as a form of *ius voluntarium humanum*, this was to be found in the unbroken customary practice of the nations, and in the testimony of the writers who were learned in it. [12]

In the order of exposition of the parts of the law of war and peace in *De Jure Belli ac Pacis*, the law of nature was primary and foundational. This was so because, in Grotius' account of the matter,

the rights that belonged to individual men under the terms of the law of nature comprised the ultimate ground of origin and justification for the rights that obtained among men in the civil state, and for the rights that states and rulers held and exercised in relation to one another in the international sphere. Certainly the law of nature, for Grotius, served to found the part of the law of war and peace that pertained to the form of political order that was embodied in the civil state. For the law of nature included among the principles of just conduct that it comprehended the principle of pacts: that is, the principle that the terms of promises, and other such voluntary agreements, were to be fulfilled by the parties to them. It was this principle of just conduct that Grotius referred to in explanation of the generation of the state, and in explanation of the normative foundations of the system of rights and obligations holding as between rulers and subjects which were integral to the state as a form of human association. [13]

The law of nature also served to found the part of the law of war and peace that had application to states and rulers in the sphere of their mutual external relations. So, for example, it was through reference to principles of just conduct comprehended within the law of nature that Grotius identified the basic lawful causes and justifications for the waging of war as being self-defence, the recovery of property and the punishment of wrong-doing. To be sure, the objects of war, as here mentioned, were treated of by Grotius as just causes for the exercise by individual men of their natural right of private war. Even so, the natural law sanction for self-defence, recovery of property and punishment of wrong-doing, as the legitimate objects for war, was also something that Grotius appealed to quite explicitly in his explanation of the lawful causes and justifications for the waging of public war by state authorities. [14] Then again, there is the principle of pacts as a fundamental principle of

natural law. This principle, in Grotius' treatment of it, ranked not only as the normative foundation for the form of legal order embodied in the civil state. The principle also ranked as a general principle of just conduct whose observance by states and rulers stood as an essential precondition for states and rulers being able to generate, through their own will and agreement, a body of law appropriate for the regulation of their external relations, and then to act in accordance with this law in mutual good faith. In this respect, the principle of pacts was, for Grotius, the principle of natural law that served to provide the underlying normative foundation for the positive or voluntary law of nations. [15]

It is clear, then, that the law of nature contained general principles of just conduct that Grotius saw as having application to states and rulers, and clear as well that certain of the principles contained in the law of nature stood as the foundation for the positive or voluntary law of nations. Nevertheless, the fact remains that the part of the law of war and peace that Grotius thought of as applying essentially to states and rulers, in their external relations, was the law of nations considered as a form of volitional human law. Thus it was that Grotius devoted a substantial part of *De Jure Belli ac Pacis* to the exposition of what he took to be the main elements of the positive or voluntary law of nations, and it is plain from the exposition of it that he presented this the law of nations proper as something that was separate and distinguishable from the law of nature. Among the elements of the law of nations that Grotius expounded in *De Jure Belli ac Pacis*, the following are particularly worthy of note: the law relating to the conditions for the waging of public war, especially with reference to the conditions of sovereign authority and the declaration of war; [16] the law of embassies; [17] the law of burial; [18] the law relating to the taking of goods of subjects to discharge the debts of rulers; [19] the law relating to the

rights belonging to the parties to public war, including rights in respect of the killing of enemies, pillage, prisoners of war and the rulership of conquered peoples; [20] the law relating to the principles of good faith that were to be observed by belligerents. [21]

There are two general characteristics of the positive or voluntary law of nations which, as Grotius explained it, go to underline what was for him the difference between it and the law of nature, and characteristics to which some explicit reference must be made for the purposes of this paper. First, it was Grotius' view that the origin and foundation of the law of nations was to be explained as lying not in the normative order given in nature itself, but rather in the will, agreement and consent of states and their rulers, and that it was from the will, agreement and consent of states and rulers that the law of nations derived its binding normative force. Thus it was that when Grotius pointed to the contrast between the law of nations and the law of nature in *De Jure Belli ac Pacis*, he emphasized that the law of nations was law that had its foundation in the mutual consent of states. [22] Likewise Grotius maintained, as he did notably in connection with the rights of states at war, that whereas the normative force of the principles of the law of nature was absolute, the normative force of the principles of the law of nations was conditional on the consent of those subject to it, or, in Grotius' own formulation, relative to some antecedent promissory act on their part. [23]

The second characteristic of the law of nations that, in Grotius' exposition of the law of war and peace, serves to differentiate it from the law of nature is that the law of nations proper was law whose primary and essential sphere of application lay with the external relations between states and rulers. This was not so with the law of nature, as Grotius conceived of it and of its sphere of application. For Grotius saw the law of nature as a body of law that ap-

plied primarily to individual men, and only in a secondary and derivative sense to states and rulers. Hence the standpoint of the law of nature was such that the essential form of war that it pertained to was that of private war: that is, war involving the adoption by individual men of the means of war in the exercise of their natural right to act in defence of themselves and their rights.

In contrast to the law of nature, the positive or voluntary law of nations, for Grotius, was law that applied essentially to states and rulers in their external relations. In the event, however, Grotius did not only present the law of nations as law that applied essentially to states and rulers. In a stronger sense, Grotius presented the law of nations as law that presupposed as the condition for its generation, and as the condition for its application to men, the association of men in states, and the subjection of men to state rulers possessing the rights integral to sovereign power. For the law of nations, as Grotius expounded it, was law that served to define, and to regulate, the public rights that were distinctive to states as bearers of sovereign power as these rights were exercised by states with respect to one another, and particularly so as regards the public rights that were bound up in the waging of war by states on the basis of their sovereign authority. Thus it was that, for Grotius, the essential form of war that pertained to the sphere of the law of nations was not private war, as waged by individual men in their own defence, but public war: that is, war waged by states on the authority of the sovereign power, and in accordance with such formal legal conditions as, for example, the condition that there should be a declaration of war issued by the state rulers concerned. Indeed, it is pertinent to observe here, in connection with the matter of public war, that Grotius was apt to present a large part of the substantive law of nations as law that followed as the effect, or the consequence, of the right of public war as a monopoly right belonging to states and

rulers. [24]

In this, Grotius' specification of the positive or voluntary law of nations, and his differentiation of it from the law of nature, carried an important implication regarding the law of nations in its character as law that applied to states and rulers in the international sphere. This was that the principles of the law of nations were to be thought of as principles that reflected, and answered to, the particular condition and attributes of states and rulers in their status as the subjects of the law of nations, and hence principles that were on this account to be distinguished from the bare principles of the law of nature as such, as this was understood to have application to individual men in respect of their specifically natural condition and attributes. The implication, here, was one that was to be worked through by Wolff and Vattel in their attempt to differentiate the law of nations from the law of nature proper, although, as it is argued in this paper, the implication was not one that was recognized or worked through by Pufendorf in his natural law jurisprudence.

In the period after Grotius, there emerged two distinct schools of writers on the law of nations. First, there was a positivist school, whose members included the German jurist Samuel Rachel (1628-91) and the Dutch jurist Cornelius van Bynkershoek (1673-1743). For the positivist writers, the law of nations was presented as law based in the consent and practice of states, with the substantive rules and principles comprising the law being looked for in such conventional sources as state custom and state treaties. In addition, there was a pure naturalist school of writers on the law of nations, for which writers the law applying to the relations between states and rulers was understood to be given in what were expounded as universal principles of natural law.

One notable representative of the naturalist school was Hobbes, as with the argument regarding the principles of law, state and gov-

ernment that is set out in his *Leviathan* (1651).[25] In this work, Hobbes made direct and explicit reference to what he saw as first-order principles of natural law, which principles he identified as the principles of peace. For Hobbes, as for Grotius before him, the principles of natural law were principles relating to the defence and preservation of men and their rights, and relating to the basic framework of social order which was essential to this end. As for the substance of the natural law, this included the fundamental principle that provided for the general duty falling on men to endeavour peace, and the related right of men to adopt the means of war in defence of themselves where peace was unattainable. Also included among the principles of natural law were the rule that men should restrict their rights on a reciprocal basis, the rule relating to the faith of agreements, the rule requiring that men should recognize one another as equals, and various rules to do with the duty falling on men to submit their disputes concerning rights to procedures of independent adjudication. As Hobbes explained them, the principles of natural law were to be thought of as presenting themselves to the reason of men in the natural condition of their mutual relations, which condition, for Hobbes, was famously that of the war of all against all. In this condition of their mutual relations, men possessed and were to exercise the right of war so as to secure their own defence and preservation, but were nevertheless compelled to exercise this right in circumstances where self-preservation was not readily to be achieved. For in the natural condition of universal war, as Hobbes famously characterized it, men were subject to no common power sufficient to maintain effective peace and order among them. Likewise, men in the natural state of war were entirely reliant on their own individual strength and initiative to defend and preserve themselves, and were so situated in relation to one another that they had no recourse to determinate

and enforceable rules for the regulation of their mutual conduct and the defining of their property rights. [26]

According to Hobbes, men in the condition of universal war were to be thought of as being directed by reason to adopt and follow the law of nature, and to give effect to the ends of peace to which the natural law pointed. Specifically, men were directed to institute and enter into the form of association embodied in states, and to do this through establishing and submitting themselves to a sovereign power possessing the particular rights and powers which were essential to states. For Hobbes, the establishing of and submission to such a sovereign power by men required some act of will and agreement on their part, and this act he termed covenant. As for the sovereign rights and powers pertaining to states that Hobbes saw as brought into being through the act of covenanting, these included the rights and powers relating to the promulgation and maintenance of civil laws, as the law that derived from the will of the sovereign and that, as such, stood for Hobbes as the essential form of human positive law. Thus the sovereign ruler in the state was to hold the legislative power together with the powers of adjudication and law enforcement, which powers sufficed to ensure the context of general security for the person and determinacy in the provision of general rules relating to conduct and property as had been absent from the natural condition of war among men. [27]

As regards the question of the external relations among states and sovereign rulers in the international sphere, Hobbes took the position that states and sovereign rulers were to be considered as co-existing together in the same condition of universal war in which individual men were situated prior to the establishing of states through covenant. However, there was no suggestion on the part of Hobbes that states were to overcome the condition of universal war through covenanting to establish, and to submit to, a common

power to govern over them. In consequence of this, there was no possibility entertained by Hobbes that states and their sovereign rulers might be subject to regulation through laws which proceeded from the will of some superior law-making power. On the contrary, Hobbes was quite clear that the law of nations, as the law applying to states and rulers in the international sphere, was not to be thought of as having the form of human positive law or as incorporating elements of human positive law, but was rather to be thought of as consisting in the same principles of natural law that summarized the basic terms of peace which were to be followed by men prior to the establishing of states. Thus it was that the basic principles of law that Hobbes considered were to have application to states and sovereign rulers, in the international sphere, were such principles as those relating to the duty of endeavouring peace, the right of self-defence, reciprocity in the limitation of mutual rights, the faith of agreements, the recognition of the equality of the subjects of the law, and the submission of disputes over rights to independent arbitration. [28] Here, Hobbes was to be followed by Pufendorf, who stands as the other notable representative of the pure naturalist school of writing on the law of nations in the period after Grotius, and who, as it will now become apparent, was in the matter of the naturalistic view of the law of nations that he favoured in certain major respects closer to Hobbes than he was to Grotius.

ii. Pufendorf and Natural Law Jurisprudence

The project that Pufendorf set himself in jurisprudence reached its culmination with the publication in 1672 of the comprehensive treatise on the law of nature and the law of nations entitled *De Jure Naturae et Gentium*, and with this work being followed one year

later in 1673 with the abridgment of its argument that was published in the form of a summary of the duties of men and citizens under natural law entitled *De Officio Hominis et Civis juxta Legem Naturalem*. Essential to the project carried through in these works was the endeavour by Pufendorf to isolate, and to specify, the fundamental principles of natural law that he took to relate to the conduct of individual men, and to set the terms of the association of men together within society and the state. In this undertaking, Pufendorf distinguished natural law from such other forms of law as remained irreducibly positive and voluntary in their character. Thus natural law was contrasted with the divine law that embodied the will of God, as this was revealed to men through the Scriptures. So also was natural law set apart from the various systems of civil law, which law was established through the will of rulers of states and was, as such, determinative of the rights and duties of men in their status as the subjects of the particular states wherein it was laid down. As opposed to divine law and civil law as forms of positive law, the natural law was a law based not in will but in reason, and, in being so, it stood as a universal law that defined the rights and duties which belonged to all men without regard for their membership of particular states and nations. Hence the natural law, for Pufendorf, was the law that was common to all men and to all nations, and it was in this sense that the law of nature and of nations is to be understood as it is made reference to in the title, and in the argument, of the treatise *De Jure Naturae et Gentium*.

The substantive principles of the natural law, in their essentials, were for Pufendorf what they had been for Grotius and Hobbes. Thus the law of nature was a law that was grounded in the right of men to act for the ends of their own self-preservation, and so act to secure and defend themselves in their person and in their rights. At the same time, the law of nature defined the foundational

principles of social order, and the duties based in these principles, whose observance by men was understood to be the precondition for the securing of their defence and self-preservation, and for the securing of their rights as relating to the person, to property and to promissory agreements. The law of nature, then, was for Pufendorf the law of self-preservation and the law of social order, or sociability (*socialitas*). In addition, the principles of natural law as relating to self-preservation and social order were divided into three distinct categories, in accordance with the different objects of the substantive duties which the principles concerned stipulated. First, there were the duties imposed through natural law that men were to be thought of as owing to God. Second, there were the duties imposed through natural law that men were to be thought of as owing to themselves. Third, there were the duties imposed through natural law that men were to be thought of as owing to one another. [129]

The principal duties that men owed to God in consequence of the natural law were duties concerning the forming of proper conceptions as to the nature of God's existence, His attributes and His powers, and concerning the proper honouring of God at the level of conduct and practice through the appropriate forms of internal and public worship. The duties of men towards God under natural law were duties relating to the sphere of natural religion and concerning the promotion of the internal cohesion of state and society, and, as such, they were duties that were independent of the principles of divine law as these were revealed to men through the Scriptures. [130]

The duties that men owed to themselves in consequence of natural law were based in what Pufendorf presented as the fundamental obligation falling on men to defend and preserve themselves. The duty of self-preservation, as Pufendorf explained it in *De Jure Naturae et Gentium*, was broadly conceived, and it included the duty belonging to all men to develop themselves through the culti-

vation and exercise of their natural gifts and talents, and hence in more general terms through the perfecting of their intellectual and physical nature. [31]

However, the crucial part of the principle of self-preservation lay in the conferring on men of the natural right to defend themselves, through the killing or injuring of those who subjected them to violent attack in their person or who violated their rights and property. For Pufendorf, the natural right of self-defence was foundational, and it held both in the condition of natural liberty where men were to be thought of as being situated outside of or prior to the establishing of the state, and in the condition of the state itself. In the condition of natural liberty, the right of self-defence was such that men were permitted to take pre-emptive measures against potential attackers, to punish attackers, and to secure guarantees from them against further assaults. In the condition of the state, where men were subject to the authority of civil government, the right of self-defence was strictly limited. Thus the exercise of force by men for the purposes of self-defence was, here, permissible only in circumstances where there existed no opportunity for them to appeal to the civil authorities for assistance and protection, while all rights relating to pre-emptions, punishments and guarantees in connection with injuries to persons were reserved to the civil authorities on an exclusive basis. Despite this, men retained the right of self-defence in the civil state as an inalienable right, and this retention of the right of self-defence by men as civil subjects confirms and underlines how, for Pufendorf, the law of nature stood as a law of self-preservation. [32] In addition, the natural duties that men owed to themselves as relating to their self-preservation were such that men were allowed the benefit of the rights of necessity. Thus in certain situations of dire and immediate peril, men were permitted to place others at risk of injury or even death, and to invade their

property, in order to defend and preserve themselves. [33]

The third category of natural law principles that Pufendorf specified were the principles that stated the duties which men were to be thought of as owing to one another. The duties of this kind were either absolute duties or hypothetical duties, and the various duties that Pufendorf saw as falling in the absolute and hypothetical categories were elaborated in extensive detail in *De Jure Naturae et Gentium*. The absolute duties in natural law to which men were subject in their conduct towards one another were the duties that men were to be thought of as owing to one another both universally and by nature in the direct sense, and hence prior to, and independent of, the formation of any human custom or institution. The hypothetical duties to which men were subject under natural law were the duties that men were to be thought of as owing to one another not on a universal basis and by nature direct, but only in consequence of the existence of some particular human custom, institution or state which had been established and accepted by men through some specific act on their part. [34]

The first and most fundamental of the absolute duties that men owed under natural law was the duty falling on men to respect their mutual rights, and to refrain from harming one another in their person and in their rights. This duty extended to all men universally and without exception, and it was, as Pufendorf presented it, the underlying foundation of all social order and of the various rights that were secured to men through the maintenance of social order. Thus it was a duty that was such as to guarantee to men proper protection for what rightfully belonged to them by virtue of their common human nature, such as their life, bodily integrity and liberty. At the same time, the duty was such that it guaranteed to men proper protection for that which belonged to them in consequence of the presence of some human institution or convention,

such as, crucially, that which belonged to them as the subject-matter of their property rights. Hence the duty imposed on men in natural law to refrain from harming one another in their person and their rights was implicit in the general prohibition on the commission of first-order crimes, as with murder, physical assault to the person, robbery and theft. Related to this duty was the basic requirement of just conduct that where men harmed one another, and so infringed rights, then they were to act to make good the loss or damage caused. Thus it was that, for Pufendorf, the principle forbidding men from doing harm to one another in their person and their rights presupposed the rule of restitution, as a rule essential to the maintenance of social order in accordance with the terms of natural law. [35]

The second absolute duty imposed in natural law that Pufendorf saw as being owed by men towards one another was the duty falling on men to recognize one another in their natural equality. This duty was grounded in the fundamental principle that all men were equal by nature, and, as such, it was a duty that Pufendorf explained as a necessary precondition for social order subject to the constraints of the rule of law. For it was a duty that required men to recognize one another as equals under the law, and in consequence of this to recognize one another as bearers of such rights and obligations as were embodied in natural law and in positive law on the basis of strict reciprocity. Hence there followed the prima facie impropriety under natural law of men exempting themselves from the duties imposed through laws that were binding on others, and so also the impropriety of men reserving rights for themselves which they were not prepared to concede to others. [36]

Next among the absolute duties of natural law that fell on men in respect of their conduct towards one another were what Pufendorf called the common duties of humanity. These were general du-

ties of benevolence through the performance of which men were able to be useful to one another, as far as this was convenient to themselves, and so provide gratuitous services and benefits for one another in such a way as to promote mutual assistance and co-operation and hence mutual good will among men. As Pufendorf explained them, the common duties of humanity were grounded in the rule of gratitude. For, as he argued, the common duties of humanity were such as to presuppose the preparedness of men to extend benefits to one another, with it following from this, as a principle of natural law, that men were to show gratitude towards benefactors, and hence to act towards benefactors in such a way that the latter would never have cause to regret their good will. [37]

The last of the absolute duties falling on men under natural law that Pufendorf considered was the duty of good faith that fell on men who were the parties to agreements, or pacts. As Pufendorf explained it, the duties of men regarding the refraining from harming one another, regarding the mutual recognition of their natural equality and regarding the concerns based in common humanity were absolute duties, but, in themselves, remained insufficient to stand as a normative framework for effective social order. For men to secure the full benefits open to them through association within ordinary society, then it was essential, Pufendorf argued, that they should enter into explicit agreements with one another, where these agreements would serve to establish fixed rules and principles to govern the interactions of men, and to do this through providing a precise determination of their mutual rights and duties. The benefits for men of the practice of voluntary agreements were self-evident in terms of the facilitating of the exchange of goods and services, and the structuring of individual projects and interpersonal relations so as to avoid conflict and deception among men. Thus it was that, to ground the practice of voluntary agreement,

there was to be assumed to hold a fundamental, and absolute, duty imposed on men under natural law to the effect that men were always to act to fulfil the terms of their promises and agreements in good faith. [38]

The principle of the faith of agreements was a principle of natural law that Pufendorf saw as conferring a quite particular normative status on the duties and obligations that were defined in the actual agreements which were brought into being in accordance with its terms. Of special relevance, here, is the distinction that Pufendorf drew, in discussion of good faith, as between the duties owed by men such as were consequent on a promise or agreement and the duties that were owed by men as common duties of humanity. The sphere of the common duties of humanity was, for Pufendorf, a sphere of authentic rights and duties, but only of imperfect rights and duties (*ius imperfectum*). For the rights and duties pertaining to the sphere of the common duties of humanity were rights and duties where proper conduct by men relating to them might be requested, and improper conduct relating to them censured on grounds of inhumanity, but where there was available no recourse to legitimate instrumentalities of coercion such as to compel men to honour the rights and to fulfil the duties in question. In contrast to the sphere of the common duties of humanity, the sphere of promises and agreements among men was the sphere of perfect rights and duties (*ius perfectum*). For the rights and duties created through promises and agreements were perfect, for Pufendorf, in the respect that these were rights and duties that were supported by a coercive power, and where it was proper and legitimate for the means of coercion to be resorted to in order to compel men to respect the rights concerned and to fulfil the duties concerned. [39]

The distinction between imperfect rights and duties and perfect rights and duties, as Pufendorf explained it in the context of prom-

ises and agreements, relates very directly to what is a central claim that he advanced regarding the principle of the faith of agreements. This was that the principle of the faith of agreements stood as the bridge, or connecting link, between the absolute duties that the natural law imposed on men with respect to one another and the hypothetical duties to which men were subject from the standpoint of the natural law. As it has been explained, the duties stated in the hypothetical principles of natural law were, for Pufendorf, duties that he saw as presupposing, as the condition for their application to men, the context provided for by some custom or institution which had been introduced and accepted by men. In the view of Pufendorf, the institutions that provided the context for the application to men of the hypothetical duties set through natural law were institutions that were founded in some specific agreement among men, and hence institutions that presupposed for their establishing and maintenance the acceptance by men of the absolutism of the foundational principle of the faith of agreements. There were three principal institutions that Pufendorf recognized and discussed in *De Jure Naturae et Gentium* as belonging to the category of institutions founded in agreements: the institution of language; the institution of property and ownership, with this including subject-matters relating to property ownership rights that involved value and the exchange of values; the institution of government in the condition of the civil state. [40]

The institution of language was an institution based in the tacit agreement of men, and, as such, it was held by Pufendorf to be governed by the principle of good faith in the matter of the duties to which it gave rise. Thus there was a general duty falling on men to apply the words belonging to their language in a regular and consistent manner, in addition to a general duty to speak truthfully in all circumstances where there existed a legitimate right and expecta-

tion that the truth should be told. [41]

In the account that Pufendorf gave of it, the basic structure of the institution of property ownership and value was explained in terms of hypothetical duties of natural law that served very clearly to give determinate effect to certain of the principal of the absolute duties of natural law. This was so, particularly, with regard to the duties in natural law that related to the respecting by men of their mutual rights, and to the requirement that men should fulfil the terms of their promises and agreements in good faith. At the same time, the institution was explained in terms where the hypothetical duties in natural law that concerned property ownership rights, and the exchange of property rights involving considerations of value, were duties that pointed to the legal forms and legal categories whose adoption by men would serve to render their substantive rights and duties relating to property ownership as perfect, and hence fully enforceable, rights and duties. Thus Pufendorf laid down, and elaborated, the hypothetical principles of natural law that had application to such as the following subject-matters: the origin of ownership in things, the bases of property ownership, the limitations on property ownership with respect to its objects, and the modes of acquisition of property; [42] the duties falling on men in consequence of their having ownership in things; [43] the principles relating to the determination of the value of things falling under rights of ownership as subjects for exchange; [44] the duties of men in the forming and fulfilment of contractual agreements involving the exchange of rights in things possessing value, and this with reference to the different forms of contractual agreement; [45] the principles governing the discharging of the duties set through contractual agreements, as with the performance or the payment of that which was owed. [46]

In the highly detailed specification that Pufendorf provided of

the civil state, as an institution based in agreement, the civil state was distinguished from certain other forms of human association whose existence it presupposed, and whose internal authority relations it comprehended. Central among the forms of association that Pufendorf treated of were the estate of marriage, the family relations as between parents and children, and the relations between masters and their slaves and servants. At the same time, there were expounded by Pufendorf the hypothetical principles of natural law pertaining to the civil state as concerned such subject-matters as the following: the constitutive causes of states, the internal structure of states, the functions of the sovereign power, the forms of state government, civil law, property, and the powers of sovereign rulers with respect to the making of war and peace and with respect to the forming of treaties with other states. For Pufendorf, the establishing of the institution of the civil state was essential for the full perfecting of all the various rights and duties that belonged to men under the terms of natural law. Thus the civil state was presented by Pufendorf as an institution possessing the means of coercive power sufficient to ensure the actual securing of the rights of men, and the actual fulfilment of the duties of men. This was so with the rights and duties that were defined in the absolute natural law, and with the rights and duties that were embodied in the organization of property ownership and contractual relations obtaining among men in accordance with the hypothetical principles of natural law. It was also so with the rights and duties that were embodied in the forms of human association, such as the family and the relation of masters to slaves and servants, which were distinct from the civil state as such. The security that Pufendorf saw the state as providing for men in regard to their various rights and duties was the principal respect in which he thought of the state as serving to overcome, and so to transcend, the defects and limita-

tions of what he presented as the specifically natural condition of the society holding among men in their relations with one another.

The natural condition of the society obtaining among men, as Pufendorf described it, was a condition of society that was to be thought of as standing in opposition to the condition of society which was to be found in the civil state. Hobbes had defined the natural condition of the relations among men as the state of universal war, and, in explanation of this, he had pointed to how, in their natural society, men were denied the benefits that came with subjection to a common governmental power, the provision of proper security for the person, and the presence of determinate and enforceable rules of just conduct. Pufendorf did not follow Hobbes in presenting the natural condition of the relations among men as the state of war as such, since he saw men in this condition as bound together through nature in the form of kinship given in their common humanity. Even so, it must be emphasized that Pufendorf accepted and made reference to, as his premises in argument, precisely the characteristics of the natural condition of men which Hobbes had cited in support of his claim that this condition of society was the state of war.

In specific terms, the state of nature, as Pufendorf described it, was the state of natural liberty and natural equality, where men were free to exercise their right and power to serve their own ends, and to do this without subjection to superior authority. Thus in the state of nature, men were to act to preserve themselves, and, in doing so, to determine for themselves how best to defend and secure their person and their rights. However, there was in this natural state no proper and effective security for men, since men were entirely dependent on their own individual strength and power to ensure the ends of their self-preservation. In particular, there was no common power with the authority to exercise government over men.

As a consequence of this, there was in the state of nature no power authorized to adjudicate and settle disputes among men as regards their rights, to prescribe rules appropriate for such adjudicative proceedings, or to apply such coercive sanctions against offenders as were necessary for the enforcement of adjudications. The absence of such a common power, for Pufendorf, did not make for a state of war in itself. However, it did mean, as he explained, that the natural state of men was a condition of society where there was no proper institutional context for the rights and duties affirmed in natural law, and hence no proper institutional context for the full realization of the ends that were set for men under natural law as concerned their self-preservation and sociability. [47]

The ends of self-preservation and sociability were to be realized, and the natural condition of society among men transcended, only within the institutional context that was set through the civil state. According to Pufendorf, the principal causal factors at work in the development of the state lay in the concern of men for protection from harm and enjoyment of the positive benefits of social existence. [48] However, the underlying foundation for the state, and for the establishing of the governmental power essential to it, consisted in the agreement of men. This was so because, by nature, men were free and equal, and hence independent of all superior authority, with the consequence that the subjection of men to the authority of the form of government maintained in the state required an explicit act of agreement by which the state, as an institution, was created and established. The state involved a unified association of men, so as to ensure decisiveness in judgments as regards common ends, and the subjection of men as associated to some common power, so as to ensure that men would in fact respect the rights of one another and thus act for the common interest. Hence, for Pufendorf, the agreement founding the state comprised both an agreement con-

cerning the establishing of the state as an association, and an agreement that concerned the determination of the person or persons on whom the institutional powers specific to the state were to be conferred. The state, as instituted through agreement, stood as a distinct legal person with its own rights and property, and with a capacity for independent will and agency that was to be exercised by the person or persons discharging the governmental powers essential to rulership in the state and hence possessing the rights and powers of sovereignty. [49]

The object of concern of the sovereign ruler in the state lay with the public good, and with the security of the state and of its subjects. In regard to this concern, the sovereign ruler held and exercised certain rights and powers which, as Pufendorf described and explained them, were indivisible rights and powers. Hence the sovereign ruler held the legislative power, as exercised in the promulgation of the general rules of conduct that comprised the civil law. The rules of civil law were to serve, among other things, to define the forms of conduct permitted and prohibited to subjects, to determine the property holdings of subjects and to determine the rights of subjects with regard to one another. At the same time, the sovereign ruler held powers relating to the executive enforcement of the law, as exercised through the imposing of punishments on those who breached the laws, and the adjudicative power, as exercised through the judicial settlement of controversies concerning the application of the law to particular cases. The sovereign ruler was also empowered to wage war against other states, to make peace with the same, and to enter into treaties and alliances. In addition to the rights and powers of war and peace, the sovereign ruler held the powers involved in the appointment of public officials charged with the administration of the business of the state, as well as the powers involved in the levying of such taxes as were necessary to meet

the expenses of the state in its conduct of public administration. [50]

There were different constitutional forms for the governmental power through which the rights of sovereignty were exercised in the state. So, for example, Pufendorf held that the government of the state might be constituted as a monarchy, as an aristocracy or as a democracy, with the form of state constitution being a matter of convention and hence the product of some act of agreement. The crucial consideration in this, for Pufendorf, was that whatever the form of constitution for government that was adopted in the state through convention, the rights of sovereignty exercised through the government, as it was constituted, remained the same. [51] So also, in Pufendorf's view, did the matter of the constitutional form of government in the state leave unaffected the defining characteristics of governmental authority in the state which, as he picked them out, served to identify the state as a sovereign and independent form of association. Thus, for example, the governmental authority in the state was to be thought of as possessing the characteristic of supremacy. This was so in the respect that the state exercised authority in accordance with its own will and judgment, and with the acts proceeding from state authority being free from subjection to the will of any external power or agency claiming superiority in relation to it. Likewise, the authority in the state was to be thought of as possessing the characteristic of non-accountability. This was so in the respect that the state was not to be compelled by some superior power to render an accounting for the exercise of its own authority, or to be held liable to punishment in connection with this. To take a final example, the governmental authority in the state was to be thought of as being immune from subordination to civil law, and this for the reason that the governing authority, as the sovereign power, was the source of civil law and hence, by definition, incapable of being subject to the civil law in its specifically public

status. [52]

The characteristics of sovereignty that Pufendorf picked out go to underline that he saw the legislative power, as a power relating to civil law, as central among the rights that belonged to the governmental authority in the state. As Pufendorf explained it, the civil law was distinct from natural law in that it was law that was generated through the will of the sovereign ruler, and hence law that presupposed the existence of the state as an institution founded in agreement. Despite this, the civil law was based in natural law, with its binding normative force for men being bound up with the first-order principles of natural law to which it gave effect. Hence the civil law defined the various rights that men were to respect in one another under natural law. At the same time, the civil law served to give effect to the agreements that men entered into in accordance with the law of nature stipulating the faith of agreements. Central among the agreements that the civil law gave effect to, here, were the agreements of men relating to contractual rights and property ownership rights, and those relating to the institution of the state itself and to the obligation falling on men to obey the sovereign ruler and to conform with the rules of law which the ruler laid down.

The particular distinction of civil law as a form of legal regulation, for Pufendorf, lay in its contributing proper specificity and decisiveness in the determination of the rights and duties contained in natural law. A further distinguishing feature of the civil law that Pufendorf emphasized was that the civil law gave rise to an institutional structure encompassing judicial procedures and the means and instrumentalities for the executive enforcement of the laws. This institutional structure was essential for the establishing of the rule of law in the condition of the civil state, and essential for the proper effecting of the provisions of natural law. For the institu-

tional structure specific to civil law was seen by Pufendorf as the precondition for the adequate observance by men of their duties under natural law, through its providing for adequate judicial remedies and effective penalties to be applied in the event that duties were not discharged. Thus it was that, in Pufendorf's account of it, the civil law, and the sovereign rights of adjudication and punishment associated with the maintenance of civil law in the state, worked to buttress the precepts of natural law with the sanction of coercive power, and, in doing so, went to ensure that within the state the rights and duties of men laid down in natural law were fully established as perfect rights and duties. [53]

The supremacy, non-accountability and exemption from civil law that Pufendorf presented as intrinsic to the sovereign power in the state were intimately bound up with the role that he saw as being played by the state, and by the rule of law that the state maintained, in bringing full realization to the ends of the natural law through the full perfection of the rights and duties that the natural law contained. This perfecting by the state of the rights and duties of men under natural law of course necessitated the subordination of men to the rights and powers of the sovereign ruler, and these rights and powers were absolute in the sense implicit in the attributing to the governmental authority in the state, as bearer of sovereignty, of the qualities of supremacy, non-accountability and exemption from limitation under civil law. The question that presents itself here, and that is central to the concerns of this paper, is to do with how, and in what form, states that were sovereign in the respects that Pufendorf identified were to be thought of as standing to one another in the international sphere under constraint and regulation through law.

In regard to this question, it must be emphasized at once that in *De Jure Naturae et Gentium*, Pufendorf very clearly pointed to

the presence of an authentic legal framework which to was apply to the relations among states and rulers in the international sphere. This was done through the specification that Pufendorf gave of the rights belonging to the sovereign power in the state as concerned war and peace, and as concerned the forming of treaties. For in the matter of these rights of sovereignty, Pufendorf set out the basic legal principles, at the level of hypothetical natural law, that he held were to regulate the conduct of states and rulers in the sphere of their mutual co-existence. Thus Pufendorf confirmed the thrust of classic just war doctrine through his insistence that the waging of war by states required just cause, such as defence against unlawful attack, the collection of what was duly owed, and the securing of proper restitution for wrongs inflicted and proper assurances for future security. He also followed just war doctrine through his insistence that the rights of war and peace in relation to the state were monopoly rights of the sovereign ruler, with the right of initiating war and the right of concluding peace agreements to terminate wars being rights which belonged to the sovereign on a sole and exclusive basis. [54] In the matter of treaties, Pufendorf summarized the principles relating to the law of treaties, considered as law applying to voluntary agreements entered into by the independent sovereign rulers of states. So, for example, he identified the category of state treaties that defined general rights and duties set in natural law, such as treaties providing for diplomatic rights and for the establishing of friendly relations and trade and commerce among nations. At the same time, he distinguished these treaties from the category of state treaties that he saw as giving effect to rights and duties which were not as such set in natural law. [55]

In principle, the rights of sovereignty concerning war and peace and the law applying to treaties, as Pufendorf expounded them, belonged to the law of nations, considered as the form of international

law that served to regulate the external relations among states and rulers. This was certainly how it had been for Grotius, as with his exposition of the principles of the law of war and peace in *De Jure Belli ac Pacis*. As opposed to Grotius, Pufendorf did not identify the rights of war and peace, and the law of treaties, as belonging to the sphere of the law of nations proper. For Pufendorf, the rights of war and peace and the rights relating to treaties, as rights of sovereignty, were rights exercised in the context of the institutional order specific to the state. Hence, these were rights which were generated through agreement, and which had their application only within the state as an institution founded in agreement. However, the explanation that Pufendorf gave of the matter was such that the sphere of the mutual co-existence of states and rulers, as the sphere of politics where international law had its immediate application, was the sphere of the state of nature, and hence the sphere of a specifically natural form of society which was to be thought of as subsisting without support of institutions and independently of all such agreements as worked to establish institutions. [56]

Given that, for Pufendorf, states and their rulers co-existed in a natural condition of society, then it followed that the law that was to serve to regulate the relations among states and rulers on the international plane could not be considered to have the status of law that derived from agreement, or that presupposed, as the condition for its application, institutional structures which depended on agreement. In other words, the law that was to be thought of as having application to states and rulers in the international sphere was nothing other than the law of nature, which law stood, in Pufendorf's specification of it, as the law stating the fundamental principles of self-preservation and social order among men. Thus it was that when Pufendorf came to consider the status of the law of nations, as the form of international law that applied to the exter-

nal relations among states and rulers, he followed Hobbes in holding that the law of nations comprised the same principles of natural law which applied to individual men prior to the establishing of states through institutional agreements. Needless to say, the principles of natural law that formed the substance of the law of nations were the absolute principles of natural law. For in the international sphere, as Pufendorf explained it, there were no institutions based in agreements holding among states and rulers, and, in consequence of this, there existed no institutional context providing for the elaboration of a law of nations comprising principles of natural law with the quality of hypothetical principles. Hence the law of nations, from the standpoint that Pufendorf adopted, was understood to comprise the following basic principles, as drawn from the sphere of absolute natural law: the principles relating to the rights and duties concerned with self-defence and self-preservation; the principles relating to the duties falling on men as concerned respect for the rights and property of one another; the principles relating to the duties of men as concerned respect for one another in their natural equality; the principles relating to the acts of benevolence and mutual assistance among men which fell within the category of the common duties of humanity; the principle of good faith in agreements, as the precondition for the forming of agreements and for their inviolability once made. [57]

iii. Pufendorf and the Fundamentals of International Law

The principles of natural law, as were identified by Pufendorf as embodying the basic substantive principles of the law of nations, present themselves as principles that form a coherent legal framework adequate for the regulation of the external relations among

states and rulers in the international sphere. Indeed, the absolute principles of natural law that Pufendorf picked out stand, in their application to states and rulers, as principles which lie at the foundations of the system of modern international law. This is true, for example, of the principle of self-preservation that based what Pufendorf saw as the duties that men owed to themselves under the law of nature. For the principle of self-preservation was such that it conferred on men the natural right to defend themselves in their person and their rights, even to the extent of killing or injuring those who attacked or threatened them. The natural right of self-defence, for Pufendorf, was an inalienable right, and if it was subject to restrictions as to its exercise by men in the condition of the civil state, it was for all that a right that Pufendorf held was the basis for the security of men in the condition of natural liberty where men co-existed together prior to the establishing of states. As for states and rulers, these were assumed by Pufendorf to co-exist in the natural condition of society, and so, as there subject only to natural law, states and rulers remained entirely dependent on the right of self-defence for their security. This right was fundamental for states and rulers in their external relations in the international sphere, with the principle of self-defence standing as the basis for the exercise by states of the sovereign rights relating to the waging of war. Here, Pufendorf clearly affirmed what is a foundational principle of modern international law, even in this the era of the United Nations. Thus it is that Article 51 of the Charter of the United Nations (1945) makes reference to the right of states to resort to acts of individual or collective self-defence as an 'inherent' right. [58]

The right of self-defence was not considered by Pufendorf to be unrestricted as to its exercise, even in the natural condition of society. For as he explained it, the right of self-defence was a right that

was legitimately exercised by men only when men acted to defend and preserve themselves in their person and in their rights and property. Hence the exercise of the right of self-defence was, in its essentials, something that Pufendorf thought of as being framed through the context set by the principles of natural law that related to the duties which men owed to one another. These were the duties whose observance by men was the precondition for the maintenance of the form of social order that, for Pufendorf, served to provide for the defence and preservation of men in subjection to the rule of law. The duties in natural law at issue here included the duties falling on men in regard to the respecting of the rights of one another, and in regard to their refraining from inflicting harm or injury on one another through the infringement of rights. Hence there were underwritten in the law of nature the rights and duties implicit in the basic prohibitions relating to crimes against the person and against property as crimes involving the violation of rights, in addition to there being underwritten the rights and duties that were bound up with the principles governing damages, and the making of restitution to injured parties, as remedial measures in respect of rights violations.

There is little difficulty in seeing how the principles of natural law that concern the duties falling on men to respect the rights of one another, and the duties to avoid harming one another though rights violations and to make restitution where rights are violated, present themselves as principles which have application to states and rulers in the sphere of their mutual external relations, and which, as such, form an integral component part of the law of nations. For states and rulers are the subjects and bearers of rights, as is so, in the case of states, with the rights relating to territorial jurisdiction and possessions and rights relating to political independence. The respecting by states of the rights belonging to one

another on a mutual basis is plainly, as Pufendorf implied that it was, a fundamental precondition for the application of the rule of law to states and rulers in the society which they form together. At the same time, the infringement of the rights of states, just as plainly, constitutes an injury or wrong under law, and, in doing so, this provides precisely the sort of pretext and justification that Pufendorf considered was essential if there was to be legitimate resort to, and exercise of, the right of self-defence as a right of war. Here too, then, Pufendorf affirmed principles that are intregral to the structure of modern international law. Indeed, the appeal that Pufendorf made to the law of nations as law requiring states and rulers to respect the rights of one another, and to refrain from rights violations, was an appeal that involved his looking forward to the development of a system of international law where the rights of states would come to be secured through the maintenance of a legal regime based in workable principles of liability for breaches of obligations relating to rights, and in workable principles of restitution for the same. The development of international law towards the realization of this ideal, and with this being in broad accordance with the view that Pufendorf took of it, is something that is reflected in the now currently evolving law of state responsibility. [59]

The requirement laid on men under natural law that they should respect the rights of one another, and refrain from inflicting harm and injury, pointed directly to the equality of men as bearers of the rights that were defined through, and grounded in, the law of nature. Thus it was that Pufendorf stated that the law of nature imposed on men the absolute duty to recognize one another as equals, with this duty involving the principle that the rights and duties that men were subject to were to be recognized as extending to all men on a universal and reciprocally binding basis. The principle of equality and equal recognition under law stood, for Pufendorf,

as a fundamental presupposition of the rule of law, in the form in which this applied to men in the condition of the civil state. At the same time, the principle of equality and equal recognition under law was intended by Pufendorf to be taken to stand as a fundamental presupposition of the rule of law that applied in the international sphere, as this was based in the laws of nature in their direct application to states and rulers. This was so not only in the respect that the terms of the natural law, in its international application, were such that there was to be full reciprocity in the assigning of rights and duties to states and rulers, but also, and more crucially, in the respect that the terms of the natural law were such that states and rulers were to be recognized as equals in their status as subjects of the law which applied to them. In the matter of the equality of states and rulers as secured to them under natural law, Pufendorf once more aligned himself with subsequent developments in international law. For the equality of states has come to stand as an essential concomitant of the sovereign independence that is assigned to states as the subjects of international law, and this such that the sovereignty and equality of states is recognized to stand as nothing less than the basic constitutional principle of international law. [60]

The absolute duties in natural law that Pufendorf saw as forming the law of nations included the category of the so-called common duties of humanity. These duties, as Pufendorf explained them, involved reference to subject-matters which had a direct bearing on the relations between states and rulers in the international sphere, and on the matter of the law pertaining to this. Thus the common duties of humanity comprehended the duties, and the rights, relating to the innocent passage of foreign goods and persons through state territories, the entry of foreigners into states and the granting of residence to foreigners therein, and the establishing of general

markets in goods and the pursuit and conduct of general trade and commerce. It is in itself highly significant that Pufendorf implied, as he did, the necessity that the law applying in the international sphere should serve to regulate trading relations among nations and states. For in implying this, he anticipated the development of international law in the modern era as a system of law that has promoted the economic interdependence of states, through providing for the setting of commercial relations among states within an effective legal regulatory framework. The last of the absolute duties in natural law that Pufendorf identified was the duty of good faith that fell on the parties to agreements, or pacts. The principle of the faith of agreements, as Pufendorf understood it to be an integral principle of the law of nations, is a principle of law that must be taken to have a self-evident application to the relations among states and rulers. For the principle lies at the foundation of the law of treaties that sets and regulates the relations among states and rulers, and, as such, it has come to receive recognition as a general principle of international law. Thus the principle of natural law stating the requirement of good faith in agreements that Pufendorf affirmed conforms, in its essential meaning, with the principle contained in the fundamental rule of international law *pacta sunt servanda*: that is, the principle that treaties are binding on the states that are the parties to them, and are to be performed by the states concerned in good faith. [61]

The principles of natural law that Pufendorf saw as embodying the substance of the law of nations were strictly the absolute principles of natural law, and included none with the status of hypothetical principles of natural law. For hypothetical principles of natural law, as Pufendorf explained them, were principles that had application in the context of institutional structures based in the agreement of men, whereas he insisted that states and rulers were to be

thought of as co-existing in a natural condition of society, rather than as bound together through their will and agreement within an institutional framework. Despite this, it must be emphasized that the hypothetical principles of natural law that Pufendorf expounded were such as to have a direct bearing on the law that applied to states and rulers in the international sphere. The hypothetical principles of natural law that arose consequent on the institution of language concerned duties in respect of truth-telling, and other matters, that were universal among men and that in certain contexts, such as the forming and the proper interpretation of agreements, were clearly compelling for the maintenance of law-governed relations among states and rulers. As for the hypothetical principles of natural law that were specific to the institution of property ownership and to the exchange of values through the institution of contractual agreement, these too were principles that concerned duties that were universal among men, and hence universal among all nations and peoples. This was so even though the positive disposition of property ownership rights and rules of contract law remained something that, for Pufendorf, was determinable not on the international plane, but only through the will of the state authorities and subject to the jurisdiction of the same. In the case of the hypothetical principles of natural law that Pufendorf saw as specific to the institution of government in the civil state, the principles in question were of the first importance for matters relating to international law. For these hypothetical principles of natural law served to define the fundamental bases of the state as a form of human association, and, in doing so, served to define the specific attributes and character of states, and rulers, considered as the subjects of the absolute law of nature which Pufendorf took to apply to them as the substantive law of nations.

The institution of the state that was explained by Pufendorf in

terms of hypothetical principles of natural law was understood by him such that the state stood as a distinct legal person with its own rights and property, and with a capacity for independent agency that was exercised by the persons discharging the powers of government specific to rulership in the state. The persons discharging governmental powers were persons with representative status, who acted through the offices of rule which were defined and established in states in accordance with their adopted constitutional forms. As for the governmental powers that were exercised as official powers, these, for Pufendorf, consisted in the rights of sovereignty. The rights essential to sovereignty in the state were directed to the maintenance of the rule of law, and related to the institutional powers that were the basis for law and legal order: particularly so the powers of law-making and adjudication, and those of executive enforcement up to and including the powers involved in the rights of war and peace and the rights of treaties. From the standpoint of the natural law hypothetical to states, the rights of sovereignty belonging to states were such as to establish states as sovereign and independent entites, and with the attributes appropriate to their having sovereignty and independence. Thus it was that, for Pufendorf, states were supreme and non-accountable, in the respect that the authorities that states exercised were exempt from subjection to the will and scrutiny of all external powers or agencies.

The essential form of the state that Pufendorf presented from the perspective of hypothetical natural law is, in its bare particulars, the one that has come to be assumed by the states which stand as the subjects of the modern system of international law. Thus for the purposes of international law, states are recognized, among much else, to bear distinct legal personality, to maintain institutions of self-government, to exercise sovereign rights in respect of the basic governmental powers essential to rulership, and to possess sover-

eignty and independence on conditions such as to exclude their subordination to powers and agencies external to themselves. That Pufendorf identified the defining principles of the modern state, in the terms that he did, is a crucial consideration in understanding the contribution that he made to the tradition of international law: as crucial a consideration, indeed, as the consideration that the terms of the laws of nature that he saw as applying to states and rulers in the international sphere served to give recognition to principles, such as those of the right of self-defence, the equality of states and the faith of agreements, which stand to modern international law as ranking among its foundational principles. Despite the recognition that Pufendorf gave to the defining principles of the institution of states, it must be emphasized that he did not succeed in providing an adequate determination of international law such that its principles were rendered properly consistent with those specific to states and rulers as the subjects of this law. That this was so is something that should be apparent in the review that follows of the defects of the concept of international law that Pufendorf adopted.

The most outstanding defect of the account that Pufendorf gave of international law lies in his denial of the presence of elements of positive law, as law based in principles of will and agreement, as an integral component part of the law applying to states and rulers in the international sphere. For Pufendorf, as for Hobbes before him, the law of nations consisted solely and exclusively in the principles of natural law in their application to states and rulers, which law was, by definition, law based in universal reason and law that was binding on states and rulers, as it was binding on individual men, without regard to their will and agreement. Here, Pufendorf and Hobbes stand in sharp contrast to Grotius. To be sure, Grotius identified and elaborated first-order principles of natural law, such as those concerning self-defence, property rights and good faith in

agreements, and held that these principles formed part of the law of war and peace as it applied both to individual men and to the relations between states and rulers. However, Grotius also held that the law of war and peace, in its application to states and rulers, comprehended the law of nations proper, with this law being positive or voluntary law which was based in the will and consent of states and rulers and which, as such, was distinguishable from the law of nature itself. In this matter, Grotius was very much more in line than Hobbes and Pufendorf with respect to the underlying trends that were subsequently to unfold in the sphere of international law. For modern international law has developed such that it is recognized to incorporate within itself strong elements of positive law, and with the positive law applying to states and rulers being recognized as embodied in such principal conventional sources of law as the customary practice of states and the treaty agreements entered into by states and rulers.

The neglecting by Pufendorf of the elements of positive law pertaining to the law applying to states and rulers underlines a more fundamental defect in his approach to international law, and one where the question of the status and position of states and rulers as subjects of international law is central. Here, once again, the contrast with Grotius is instructive. For Grotius, the positive or voluntary law of nations was not only law that originated in the will and consent of states and rulers. More strongly, the voluntary law of nations was law that had specific and exclusive application to states and rulers as its quite particular subjects. Against this, there was the law of nature, which, for Grotius, was law that applied to states and rulers, but law that had common and indiscriminate application to individual men and to states and rulers, even though its effects and consequences as law for men were radically distinct from those for states and rulers. As with Grotius, Pufendorf saw natural

law as applying both to individual men and to states and rulers in the international sphere. However, for Pufendorf (as opposed to how it had been for Grotius), there was no appeal to be made to a positive law of nations with specific and exclusive application to states and rulers. Thus it was that Pufendorf provided an inherently defective concept of international law, where the principles of international law were left unrelated to the actual situation of states and rulers, and where, as a result, the juridical sufficiency of international law was left fatally undermined at the level of the rights and duties which the law was intended to stipulate and give effect to.

The principles of natural law, as Pufendorf explained them, were such that, under their terms, individual men were directed to establish, and to subject themselves to, states and state institutions. This was essential, for Pufendorf, if the rights and duties belonging to men in natural law were to be rendered as perfect rights and duties. For perfect rights and duties were rights and duties that were enforceable through the exercise of coercive power, where the power securing the rights and duties was relative to some institutional structure based in acts of will and agreement. Thus it was that it was the state that Pufendorf saw as serving to perfect the rights and duties of men, given that, as he explained it, states had established in them the procedures relating to law-making, adjudication and executive authorities which provided for the proper and effective enforcement of the rights and duties falling on men under natural law.

In common with the situation of individual men, the situation of states and rulers, for Pufendorf, was one where states and rulers were subject to the absolute principles of natural law. However, Pufendorf still recognized a crucial point of contrast as between the situation of individual men in respect of natural law and the situation of states and rulers. This was that as opposed to how it was

for individual men, there was no requirement set in natural law that provided that states and rulers were to subject themselves to some institutional authority possessing the means of coercive power sufficient for the enforcing of their respective rights and duties. On the contrary, Pufendorf insisted that states stood to one another in the international sphere as in a natural condition of society that was exclusive of all institutional frameworks based in will and agreement, and hence that, among states and rulers, there were present no hypothetical principles of natural law applicable to the international sphere sufficient to bring juridical perfection to the rights and duties of states and rulers. Beyond this, of course, it should be emphasized that the terms of the hypothetical principles of natural law that Pufendorf saw as specific to the institution of the state were themselves such that states were to stand as sovereign and independent entities, and as supreme and non-accountable in their powers and authorities, and so in consequence of this were to remain free from the subjection to governmental control of the sort that was proper to individual men within the institutional context of states.

The view that Pufendorf took of the situation of states and rulers in international society was one where there was implied what has come to be recognized as an inherent limitation of international law as a mode of legal regulation. This is the absence from international law, as law applying to states, of centralized sanctions to be imposed for non-fulfilment of obligations, and of centralized institutions of law-making, adjudication and executive enforcement to maintain and give effect to the law. Even so, it must be said that while Pufendorf properly recognized the limitation of international law, the presentation that he made of this was such that he was drawn to make the unfortunate and unwarranted conclusion as to the essential imperfection, and hence the juridical insufficiency, of

international law in respect of the rights and duties to which it related. That Pufendorf concluded this was inevitable, given that he saw states and rulers as bound only by absolute natural law, and as standing independent from all institutional frameworks established through will and agreement and embodying natural law principles of the hypothetical form. However, it is this conclusion on Pufendorf's part that underlines his signal failing as regards the determination of the concept of international law. For what it is here underlined is that Pufendorf failed to determine the concept of international law, and the principles of law essential to the concept, in terms where the principles of international law were taken to answer to the actual situation and attributes of states and rulers, but where the juridical integrity of international law was nevertheless vindicated and preserved and the juridical perfection of rights and duties at international law was properly recognized and assured. This failing was to be avoided, and a more adequate concept of international law to be determined, in the work of Wolff and Vattel.

iv. Wolff and Vattel

Wolff and Vattel were the successors to Grotius, Hobbes and Pufendorf in the modern secular natural law tradition. As such, Wolff and Vattel thought of natural law as a universal law of reason that applied to men in the condition of nature which existed prior to the institution of political society, and that, in doing so, stood as a law that related to principles of self-preservation and to the basic principles of social order which served to promote the ends of self-preservation. Hence they presented the natural law, in its application to the international sphere, as law that stated the conditions conducive to the self-preservation of states, and the conditions of so-

cial order among states and rulers which would secure the defence and preservation of states and the rights and interests of states. Where Wolff and Vattel are to be aligned with Grotius, and to be set apart from Hobbes and Pufendorf, is in the respect that they took the law applying to the relations between states and rulers to comprise not only the law of nature, but also what they recognized to stand as the positive law of nations. As Wolff and Vattel explained it, the sphere of the positive law of nations included the principles of natural law that were adapted to accord with the circumstances of states and rulers, and in accordance with their will and consent. This part of the law applying to states and rulers, as Wolff and Vattel distinguished it, is of crucial importance in understanding how they transcended the sort of limitations imposed by Pufendorf in the determination of the concept of international law. For, here, Wolff and Vattel presented principles of natural law in application to states and rulers that, in essence, had the form and status of what, from Pufendorf's standpoint, were hypothetical principles of natural law, and, in this context, natural law principles that were hypothetical to the condition of society specific to states and rulers.

In the exposition of the elements of the law of nations that Wolff set out in *Jus Gentium Methodo Scientifica Pertractatum*, there were identified four distinct parts of the law of nations. First, there was what Wolff termed the necessary law of nations: the *ius gentium necessarium*. The necessary law of nations consisted of the law of nature in its direct application to nations and states. As the law of nature applied direct to nations and states, the necessary law of nations was strictly binding in conscience and, in its essence, absolutely unchangeable. Hence this part of the law of nations was universally binding on all nations and states, in the respect that no nation or state was at liberty to free itself, or any other nation or

state, from the obligations that the law imposed. [62] The second part of the law of nations was the law that Wolff saw as deriving from the necessary law of nations and hence as binding universally on all nations and states, but as comprising such adaptations of the necesssary law as were essential for the securing of the common interests of nations and states. This was the voluntary law of nations: the *ius gentium voluntarium*. The third part of the law of nations was what Wolff called the stipulative law of nations: the *ius gentium pactitium*. The stipulative law of nations was the law of nations as it was set through the treaties, or stipulations, agreed to by two or more states. The fourth part of the law of nations was the customary law of nations: the *ius gentium consuetudinarium*. The customary law of nations was the part of the law of nations that was established through the long usage and observance of nations and states. [63]

While the voluntary law of nations was understood by Wolff to derive from the necessary law of nations, and hence to be based in natural law, it remains the case that Wolff placed the voluntary law of nations with the stipulative and customary law as forming the positive law of nations: the *ius gentium positivum*. Thus the voluntary law of nations belonged to the positive law of nations in the respect that it proceeded from the will of nations and states, and that it rested on their presumed consent. [64] In order to explain the status of the voluntary law of nations as law based in natural law yet involving the consent of nations and states, Wolff argued that the source of this law, and the sphere of its application, were to be understood as lying in a quite particular form of association that he saw as obtaining among nations and states in the international sphere. This association of states Wolff called the *civitas maxima*, with this being presented as a supreme state of which all nations and states were to be counted as members or citizens. [65]

For Wolff, the separate nations and states were to be thought of as having been brought together by nature, and by their agreement, to constitute a single unified state, whose defining end and purpose lay with the promotion of the common good of the nations and states through the means of their combined powers. The supreme state so formed among the nations and states was explained by Wolff as possessing certain of the characteristics that belonged to the institution of the civil state. Thus the supreme state was understood to have its own system of laws, and to possess the right and power of law-making. The laws specific to the supreme state were held to be binding on all nations and states, and, as such, to be supported by a general right belonging to the supreme state to coerce those nations and states which failed to fulfil their obligations under law. The right of coercion, so defined, was such as to imply that the nations and states associated together in the supreme state possessed a measure of collective sovereign jurisdiction over individual nations and states. Hence the supreme state was understood to have its own government, with this, for Wolff, being democratic in form as in accordance with the collective nature of the sovereignty that was vested in the supreme state and in the whole body of the nations and states which comprised it. [66]

The supreme state was also understood by Wolff to embody the will of all nations and states, and to have a ruler who gave effect to this will. Consistent with the democratic principle basing the government of the supreme state, the united will of nations and states was to be identified through the will of the majority of nations, as this majority will had its embodiment in the law of nations as adopted by the more civilized nations. As for the ruler of the supreme state, his office was described by Wolff as concerning the definition of the law which expressed the collective will of the various nations and states. This law was binding on all nations and

states, although it was not identical in every particular with the law of nature. As Wolff explained it, the idea of the ruler of the supreme state was a fiction, and one that had to be appealed to in order to account for the adaptations that had to be effected to the necessary law of nations such as to render this consistent with the defining purpose of the supreme state. The law that came into being through the adaptations made of the necessary law of nations stood as the voluntary law of nations. Thus it was that, for Wolff, the voluntary law of nations was law whose origins were accounted for in terms of the fiction of its being law laid down by the ruler of the supreme state, and so, as in accordance with this fiction, law that was understood to originate in the will of nations and states. However, the ultimate foundation of the voluntary law of nations lay in nature, rather than in the will of nations and states as such, given that, as Wolff insisted, it was from the necessary law of nations that the voluntary law was derived. [67]

The idea of the *civitas maxima* was intended by Wolff to explain not only how nations and states were to be thought of as bound by a system of universal law that was based in a normative order embodied in nature. In addition to this, the idea of the *civitas maxima* was intended to explain how the universal law of nature binding on nations and states nevertheless required the will and consent of nations and states for its application, as law, to the condition of their mutual relations in the international sphere, and how in being so applied the law was modified to accord with the defining status and attributes of nations and states. The voluntary law of nations was the very essence of the law that Wolff sought to account for by reference to the idea of the *civitas maxima*, and this he presented as the law of nature which was specific, in its application, to nations and states and to their condition. Given that the voluntary law of nations, for Wolff, was the law of nations pertain-

ing to the *civitas maxima*, this form of the law of nations must be seen as comprising principles of natural law law applying in the international sphere that remained relative, or hypothetical, to an institutional framework in the sort of respects that Pufendorf had expressly excluded from consideration. As for Vattel, however, he is notable for the reason that he firmly rejected the idea of the Wolffian *civitas maxima* in explanation of the foundations of the law of nations, and, with it, the necessity of an institutional framework among nations and states to ground the law of nations. In doing this, Vattel moved even further from Pufendorf than Wolff had done in explaining how the law of nature gave rise to a system of the law of nations where principles of natural law applied to, and related to, nations and states in accordance with their specific and defining status and attributes.

The original intention of Vattel in writing *Le Droit des Gens* was to provide only a translation and popularization of Wolff's *Jus Gentium Methodo Scientifica Pertractatum*. In the event, however, *Le Droit des Gens* was to become recognized in its own right as an authoritative statement of the public law of nations, as this was observed by the European states. In the treatise, Vattel followed the four-part division of the elements of the law of nations that Wolff had adopted. First, there was the necessary law of nations: *le droit des gens nécessaire*. This comprised the law of nature in its direct application to nations and states, and, as such, stood as that part of the law of nations which was strictly binding on nations and states, and on rulers, as a matter of conscience. [68] Second, there was the voluntary law of nations: *le droit des gens volontaire*. This for Vattel, as for Wolff, was the law of nations that resulted from adaptations of the law of nature, and that, as Vattel explained it, involved the modifications made to the strictness of the law of nature in its application to the actual affairs of nations and states and of rul-

ers. [69] Third, there was the law of treaties, or the conventional law of nations: *le droit des gens conventionnel.* [70] Fourth, there was the customary law of nations, or international custom: *le droit des gens coûtumier,* or *la coûtume des nations.* [71] The voluntary, conventional and customary forms of the law of nations presupposed the consent and agreement of nations and states as the condition for their establishing and application, and so went together to comprise the sphere of the positive law of nations: *le droit des gens positif.* [72]

If Vattel followed Wolff in the matter of the basic division of the parts of the law of nations, he diverged markedly from his predecessor as to the explanation he gave of the foundation of the voluntary law of nations. It was in this connection that Vattel squarely rejected the idea of the *civitas maxima*, and with it Wolff's implication that there might exist a supreme state in the international sphere which possessed the sort of rights and powers specific to the institution of the civil state, and to which nations and states were to be subordinated. For Vattel, no such supreme state was conceivable, and this for the reason, as he emphasized in the Preface to *Le Droit des Gens*, that the form of association specific to the state was not be found obtaining among nations and states, given that nations and states were, and claimed to be, fully independent entities. [73]

According to Vattel, the idea of the *civitas maxima* was not only irreconcilable with the actual independence belonging to nations and states, but it was also quite unnecessary to follow Wolff in making reference to such an international governmental framework in order to explain the foundations of the voluntary law of nations. Instead, Vattel argued that the principles of the voluntary law of nations were to be derived through consideration of the purpose and the general laws of the form of natural society which he saw as existing among all nations and states. For Vattel, nations and states

were to be thought of as possessing the moral status and attributes of free and independent persons, and hence as standing to one another in the same condition of mutual relationship as individual men stood to one another in the state of nature that preceded the establishing of civil society. In the natural condition of their coexistence, nations and states, as much as the individuals who comprised them, were to be considered as the subjects of the obligations and rights which were embodied in the law of nature. It was this law, and the obligations and rights that it defined, which stood as the foundation both of what Vattel saw as the universal society established by nature among all men, and of what he saw as the universal society established by nature among all nations and states. These two forms of natural society were linked together through the law which founded them, and which served to define their respective ends. Thus it was that, for Vattel, men were united in a natural society where they were bound to assist one another to the end of perfecting themselves and their condition, just as nations and states were to be thought of as being bound to assist one another in the realization of their own perfection, and that of their condition, as the ultimate end of the natural society that they formed among themselves. [74]

Wolff had written of nations and states being bound together in a natural condition of society that was continuous with the society that nature had caused to be established among men. He had written also of how the common good of the natural society of nations and states lay in the nations and states assisting one another to promote the end of their own perfection, and that of their mutual condition. For Wolff, however, the full realization of the ends essential to the common good of nations and states was something that he saw as presupposing that the separate nations and states were to be thought of as having passed beyond the natural form of their

society, through their binding themselves together in the institutional form of political association embodied in the *civitas maxima*. [75] This was not the position that Vattel took. For Vattel, the ends of the natural society holding among nations and states were given in the general laws that he saw as lying at its foundations. These, as he explained them, were the laws whose terms were such as to exclude the possibility of the separate nations and states being thought of as subject to the authority of a supreme international state. The first of the general laws that Vattel presented as founding the natural society of nations was that nations and states were to contribute to the well-being and development of other nations and states, to the extent that this was in their power and consistent with the pursuit of their own well-being and development. [76] The second general law affirmed the natural freedom and independence of nations and states, and provided that the nations and states were to exercise their natural liberty under conditions of peace and to respect the rights that belonged to one another by nature. [77] As a further general law of the natural society of nations and states, there was the principle of the equality of nations and states. Here, Vattel emphasized that just as individual men were equals by nature and with the same naturally sanctioned obligations and rights, so also were nations and states, considered as free persons or entities coexisting in the state of nature, to be recognized as equals by nature and as holding from nature the same obligations and the same rights. [78]

For Vattel, then, the natural society obtaining among nations and states was a form of society based in general laws which worked to confirm and secure the freedom, independence and equality of nations and states. It was the principle that nations and states were free, independent and equal that formed the basis for the deriving of the modifications to the strictness of the natural law,

which modifications Vattel saw as being required for the establishing of a system of law conducive to the regulation of the relations among nations in the actual condition of their mutual society in the international sphere. In other words, it was the natural society of the nations and states as such, presented as a society of free, independent and equal nations, that stood as the foundation for the voluntary law of nations. For in the explanation that Vattel provided of it, the voluntary law of nations was essentially the law of nature modified to form rules and principles that accorded with, and gave effect to, the general laws which provided that the perfection of nations, and the perfection of their condition, demanded their continuous contribution to the well-being and development of one another, together with the preservation of their mutual freedom, independence and equality.

The explanation that Vattel gave as to how the voluntary law of nations derived from natural law was crucially bound up with his appeal to a classification of different types of obligations and rights, and one that was based in the distinction, such as Pufendorf had drawn, as between perfect obligations and rights and imperfect obligations and rights. According to Vattel, obligations were either internal obligations or external obligations. Thus obligations were internal when they were binding on men in conscience, and were derived from rules and principles setting out the basic duties of men under natural law. External obligations were obligations that gave rise to rights which were held by other men. For Vattel, the category of external obligations was divided into perfect obligations and imperfect obligations, with the rights to which these gave rise being divided into perfect rights and imperfect rights. In this closely following the analytical schematization of obligations and rights set out by Pufendorf, Vattel maintained that perfect rights were rights where there was present a right to compel the performance of the

obligations to which they corresponded. Imperfect rights were rights whose corresponding obligations were not capable of being enforced in this way. Perfect obligations were obligations where there existed a right to enforce the fulfilment of their terms. Imperfect obligations, by contrast, were obligations where there existed no right of enforcement as such in respect of their subjects, but only a right to request that the terms of the obligations should be fulfilled. [179]

This classification of obligations and rights related to the matter of the voluntary law of nations as law deriving from natural law as follows. From the standpoint of the voluntary law of nations, Vattel argued, the separate nations and states were not as such accountable to one another for the intrinsic justice of their conduct, as this was to be determined through consideration of what was owed in strict conscience under the law of nature. This was so, for Vattel, for the reason that nations and states were to be thought of as being at liberty to decide for themselves what was required of them in conscience in the discharging of their natural obligations, and, in consequence of this, to be thought of also as possessing a perfect equality in rights in respect of one another and in the context of their mutual relations. Vattel accepted that the liberty of nations and states remained limited, but only in the regard that nations and states were accountable to one another for violations of those of their obligations and rights which were perfect external obligations and rights, and which, as such, were enforceable as between their bearers. As Vattel explained it, then, the voluntary law of nations did not pertain to the law of nature in its entirety. It pertained only to the obligations and rights of nations and states that were external and perfect obligations and rights, and whose enforcement as obligations and rights remained consistent with the liberty and equality which belonged to nations and states by nature. As for the justification for the voluntary law of nations and the various modifi-

cations of natural law that it involved, this Vattel saw as something that was to be found based in the consideration that the means of force and coercion were not to be used by, and against, nations and states in such a way as to undermine their natural freedom, independence and equality. It was to this voluntary law that the nations and states were to be presumed to have consented, as a complex body of rules and principles whose observance by nations and states stood as a precondition for the realization of the ends of the natural society that they formed together. [180]

The view of the law applying to nations and states as the natural law modified, so as to accord with the freedom, independence and equality belonging to nations and states, is one that is to be found everywhere informing the statement that Vattel provided of the substantive law of nations in *Le Droit des Gens*. Of crucial concern, in this connection, are those subject-matters of the law of nations where Vattel distinguished between the relevant principles given in the necessary law of nations and the relevant principles given in the voluntary law of nations, and, in doing so, underlined that it was the voluntary law that embodied the law which had application to nations and states in their actual condition and circumstances. This was so, for example, with respect to Vattel's treatment of the law of nations as it related to commerce among nations, and also with respect to much of his treatment of the law of war. [181]

In the explanation that Vattel gave of the issue of international commerce, the separate nations and states were assumed to be seized of a fundamental right, and to be subject to a fundamental duty, to engage in commerce for the securing of that which satisfied their mutual needs and interests. As for the foundation of the right and duty of nations and states to engage in commerce, this was understood to be given directly in the law of nature. However, the rights and duties bound up with commercial exchange among na-

tions and states, such as were grounded directly in natural law, were imperfect rights and duties, and hence rights and duties which were not capable of being enforced as between nations and states. This was so because, as Vattel emphasized, it followed from the natural liberty belonging to nations and states that the nations and states were to be free to determine for themselves whether, and if so to what extent and on what conditions, they would enter into commercial relations with one another, and to be free to determine this in accordance with proper judgments concerning their general security and advantage. The freedom of the nations and states to set the terms of their trade and commerce with one another in the international sphere was, for Vattel, the fundamental principle of the voluntary law of nations as it served to define the law of commerce. Hence it was provided for in the voluntary law of nations, as distinct from the necessary law of nations, that commerce among nations and states was to be made subject to the law of treaties, and with this having the consequence that commercial rights and duties as between nations and states were to be considered perfect, and so enforceable, only where these were based in treaty agreements entered into by specific consenting nations and states and thereby given the force and status of conventional law. Thus it was that Vattel saw the principle of freedom of commerce among nations and states as a principle based in natural law, yet as a principle that had application to nations and states only within the context of a system of voluntary law which worked to enshrine, and to give effect to, the freedom, independence and equality of the separate nations and states. [82]

As regards the law of nations as it concerned the waging of war, Vattel saw the law of nature, as this formed the necessary law of nations, as grounding the fundamental right of nations and states to wage war in defence of their rights and as restricting the occa-

sions for the permissible exercise of the right to those where conventional just cause for war existed. However, it remains the case that while Vattel based the right of war in the law of nature, he still nevertheless insisted that it was not open to nations and states to act to enforce the terms of the law of nature against one another in all its rigour. On the contrary, he emphasized that when nations and states resorted to war, it was required of them that they should conform with such rules and principles based in, or pertaining to, the sphere of the voluntary law of nations as worked to preserve an equality of rights as between belligerents. One consequence of this, for Vattel, was that while the necessary law of nations was such that, from the standpoint that it afforded, no war between different nations and states was properly to be considered just on both sides, the voluntary law of nations was such that it provided that wars between nations and states were properly to be considered just on both sides with regard to the legal effects of war. Accordingly, it stood as a rule of war pertaining to the voluntary law of nations that whatever means of war were held to be permitted to belligerent nations and states were also to be held as permitted to all belligerents on an equal basis, and without condition as to the intrinsic justice of cause. Thus did the voluntary law of nations involve modification of the principles of the law of war as the means for enforcing the rights of nations and states that the law of nature underwrote, and with this so as to reflect and to give effect to the very equality among nations and states which stood as the fundamental principle of natural law in its application to nations and states. [83]

As it will be clear from this, the voluntary law of nations, for Vattel, was the law of nature in its application to nations and states which were recognized to stand as free, independent and equal entities. Hence the voluntary law of nations was law that gave recognition to, and that served to regulate, nations and states in their

status as sovereign nations and states. This was so for the reason that the freedom, independence and equality that Vattel saw as belonging to nations and states, and as determining the modifications to natural law such as went to form the voluntary law of nations, were in themselves the essential aspects of the sovereignty that he insisted was held and exercised by nations and states as subjects of the law of nations. [84]

It is the emphasis that Vattel placed on the sovereignty and independence of nations and states, as the subjects of the law of nations, that marks him off from Wolff, as is evident, most particularly, with his explicit rejection of the Wolffian ideal of the *civitas maxima*. For, here, Vattel insisted that the sovereign independence of nations and states was such that nations and states were to remain exempt from subjection to external political authority, and that this exemption was something that was implicit in the very terms of the law which applied to nations and states and which served to give juridical definition to their sovereignty and independence. In this matter, Vattel closely followed Pufendorf. For Pufendorf, of course, saw nations and states as exempt from external political authority in such respects as their being supreme and non-accountable, just as he held, as Vattel did after him, that nations and states were free, independent and equal, and hence sovereign, under the terms of the law of nature which applied to them. However, and to repeat this, it must be said that Pufendorf presented nations and states as sovereign in terms such that nations and states stood to one another in the international sphere in strict subjection to the absolute principles of natural law, but not in mutual association within an institutional framework based in consent and agreement where the law applying to them was hypothetical in form and hence sufficient to confer juridical perfection on the substantive rights and duties which the law stipulated. In contrast to

Pufendorf, Vattel was prepared to recognize the presence of an institutional framework as setting the context for the co-existence of nations and states in the international sphere. The framework concerned was not a political-institutional structure analogous to the Wolffian *civitas maxima*, but was instead the framework set through the laws that applied to nations and states in what Vattel presented as being the condition of the natural form of their mutual society. This framework was the one comprising the voluntary law of nations, which framework was institutional in its being based in the consent and agreement of nations and states, and which, in being so instituted, provided for the perfecting of the rights and duties of nations and states arising from the principles of natural law.

The determination that Vattel made of the voluntary law of nations does not only serve to mark him off from Pufendorf, and to point to his superiority in elaborating the concept of international law as in relation to his predecessor. In addition, the appeal that Vattel made to the idea of the voluntary law of nations serves to underline that which is most distinctive about his contribution to the development of the concept of international law, in his status as a modern secular natural law thinker. Here, it must be emphasized that with his appeal to the voluntary law of nations, Vattel followed Grotius, Hobbes and Pufendorf in affirming that the law of nature stood as the foundation for the law applying to nations and states in the sphere of their mutual external relations, and hence that it was the natural law that comprised the fundamental substantive principles of the law of nations. At the same, however, the idea of the voluntary law of nations was such that, through appeal to it, Vattel was able to expound the principles of natural law as modified through the form of their application to nations and states. This, of course, meant in its turn that he was able to identify and expound the principles of natural law that were specific to nations and states

and to their condition, as distinct from the principles of natural law that had application to individual men in the condition of society obtaining prior to, and independently of, the forming of nations and states. Thus it was that in exposition of the law of nations, Vattel looked beyond the undifferentiated natural law principles, such as self-defence, good faith, and equality and equal recognition, to which Hobbes and Pufendorf had restricted themselves. Thus it was also that, in looking beyond the limits of undifferentiated natural law principles, Vattel served to carry forward the enterprise of Grotius in *De Jure Belli ac Pacis* through constructing a comprehensive doctrine of international law that, in accordance with the conception of the voluntary law of nations, made reference to all the basic substantive elements of the law of nations as the law pertaining to states and rulers. [85]

Conclusion

The exposition that Vattel provided of the elements of the law of nations in *Le Droit des Gens* marks the culmination of the modern tradition of secular natural law theorizing, as this was directed to the elaboration of the concept of international law. In contrast to Vattel and his exposition of the law of nations, the specification that Pufendorf gave of the elements of the law of nations remained seriously deficient, and this for the reasons that are set out in the present paper. Thus Pufendorf failed to elaborate principles of natural law that would do full duty as a system of the law of nations, given that the principles that he identified were not modified so as to have application to states and rulers as the subjects of the law in their actual condition and circumstances. So also, and in consequence of this failing, Pufendorf failed signally to confirm the juridi-

cal perfection of the rights and duties that were embodied in the substance of the law that he saw as applying to states and rulers in the sphere of international society. Despite the deficiencies of Pufendorf on the law of nations, it remains the case that the natural law jurisprudence that he systematized served to set the underlying conceptual framework which was to be adopted by Vattel in exposition of the law of nations. It is likewise the case, as it is insisted on in this paper, that the principles of natural law that Pufendorf identified as the substance of the law of nations rank among the defining and fundamental principles that are present within what has come to be accepted as the prevailing concept of international law. That this is so underlines the commitment of Pufendorf to the ideals set for international law which are so distinctive to the modern secular natural law tradition as initiated by Grotius and Hobbes.

The idealism of the secular natural law thinkers in regard to international law is reflected, most particularly, in two fundamental claims that the thinkers made concerning the concept of law as such. First, there is the claim of the natural law thinkers as to the essential unity of the spheres of law and morals, with this being the claim that the law incorporated, and contained, within itself certain first-order principles of justice and political morality. The unity of law and morals was a core claim of the secular natural law thinkers, and one that, in respect of international law, was everywhere appealed to by Grotius, Hobbes, Pufendorf, Wolff and Vattel in their insistence that the principles of natural law, as these comprised the first-order principles of justice and political morality, were principles of law which had a direct application to states and rulers in the sphere of their mutual relations. Thus it was that the principles of self-defence, good faith in agreements and equality and equal recognition, as principles of justice and political morality enshrined in

natural law, were affirmed as integral component parts of the law which was to set the basic terms of the relations among states and rulers in the international sphere.

The second of the key jurisprudential claims of the secular natural law thinkers that stands out is the claim that the principles of justice and political morality, as contained within law, were principles that possessed the objective validity, and universal application, appropriate to them as principles of natural law and that, as such, embodied laws which were to be thought of as being based in the order of nature itself. It was very much in these terms that the secular natural law thinkers held that the principles of justice and political morality pertaining to natural law formed a sphere of law that possessed a normative status, and a binding normative force, which were such as to serve to distinguish it from the sphere of positive law, where law was understood to be generated through decisive acts of will, consent and agreement. The distinction drawn between the spheres of natural law and positive law was critical as regards the elaboration of the concept of international law. For in the drawing of it, the secular natural law thinkers were able to affirm that the law of nations incorporated, as part of itself, rules and principles of conduct that, as rules and principles comprising the laws of nature, were distinct from the parts of the positive law of nations which were based in sources where the will, consent and agreement of states and rulers were actively engaged and involved. Thus it was that the general principles of justice and political morality belonging to the law of nations, as part of natural law, were recognized to be distinct from the law deriving from the customary practice of states and from the treaty stipulations of states and rulers. So also were the general principles of justice and political morality pertaining to natural law recognized to have direct and binding application to states and rulers without regard to the perform-

ance of acts establishing their consent and agreement to be bound, such as would be presupposed for the obligations of states and rulers under customary law and treaties.

Following Vattel, the principles essential to the modern secular natural law tradition in jurisprudence were challenged, and the basic claims as regards law advanced within the tradition brought into question, with the emergence of successor schools in legal and political thought. The undermining of the secular natural law tradition extended to the bringing into question of the principal claims made by the secular natural law thinkers as regards the formal juridical status and normative authority of international law. This was so, not least, in respect of the two philosophers who, as they wrote during the final decades of the eighteenth century, were to be central in the rejection of the natural law standpoint in jurisprudence. The first of these was the German philosopher Immanuel Kant (1724-1804). In relation to the matter of the tradition of secular natural law theorizing, Kant is especially notable given that, in the context of discussion of the law of nations, he quite expressly repudiated the doctrines of Grotius, Pufendorf and Vattel. In doing this, he was led to insist, in opposition to the view of the earlier natural law theorists, that the law of nations would have to be founded, and its binding normative force validated, not by reference to antecedent principles of law that were assumed to be given in the order of nature, but rather through reference to the acts of will and agreement of the states which were by means of such acts to be bound by law. This was the essential meaning of the claim that the law of nations was to be founded in the voluntary participation by states in a formal treaty agreement for the establishing among themselves of a constitutional federation of states, which claim Kant famously advanced in his treatise *Perpetual Peace* (1795). [86]

The second philosopher to be reckoned with here, in the matter

of the repudiation of the secular natural law tradition, was the English legal and political theorist Jeremy Bentham (1748-1832). For Bentham it was who initiated the classic positivist tradition in Anglo-Saxon jurisprudence. The positivist jurisprudence that Bentham constructed was one where, in direct opposition to the natural law standpoint, the sphere of law was presented as being formally distinct from the sphere of justice and morals. As for the analysis of law that Bentham provided, this was an analysis where law was explained as being founded not in a normative order embodied in nature, but in the decisive acts of will of its author, and where the rule of law, as this was maintained in the state, was explained as being essentially the rule of positive law and, as such, as comprising commands and prohibitions which issued from the will and authority of the sovereign possessing the legislative power. The terms of this the so-called imperative analysis of law were deeply subversive of the ideal of international law: for if law proper was positive law and positive law was based in the will of sovereigns, then it followed by implication that international law was improperly to be thought of as law, given that the sphere of international society knew of no sovereign authorities through whose will an authentic rule of law based in explicit commands and prohibitions might be established. This implication was to be drawn out later by the distinguished disciple of Bentham, the English jurist John Austin (1790-1859), who held that positive law proper consisted of commands issued by sovereigns and supported by coercive sanctions, and that, in consequence of this, international law was to be thought of as pertaining not to the sphere of positive law, but to the sphere of what he called positive morality. Thus it was that Austin affirmed the claims of justice and morality for the realm of international politics, but only at the great cost of denying the status of law to the rules and principles by which justice and morality in the

international realm were to be defined, and so through this establishing with his positivist jurisprudence, and in counteraction to the idealism of the secular natural law thinkers, the final and absolute dissociation of the sphere of international morals from that of international law. [87]

The general philosophical context for the jurisprudence relating to the international law of the contemporary era is one that, to a very large extent, has been established and set by the traditions in legal and political thought to whose emergence thinkers like Kant and Bentham so decisively contributed. However, it must be emphasized that present international law is not amenable to full and adequate explanation in accordance with the voluntarist and positivist assumptions that inform the view of law argued for by Kant and Bentham, but, rather, that international law in certain of its aspects demands explanation from a jurisprudential standpoint closer to the one adopted by the secular natural law thinkers. In this connection, there is everything to be said about the body of rules and principles that form the now developing law of international human rights. For these are rules and principles where, in defiance of positivist dogma, the law plainly incorporates within itself first-order principles of justice and political morality at the level of substantive law and at the level of the interpretation and application of substantive law. There is also everything to be said, here, about what is now the acceptance as an authoritative source for international law of general principles of law whose binding normative force for states is recognized to be independent of their own will and agreement to be bound, and where the general principles of law concerned are accepted as being formally distinct from the sources of international law embodied in state custom and state treaties which presuppose the will and agreement of states as the condition for their emergence and application. The general principles that are ac-

knowledged to stand as the non-voluntary principles of international law include principles, such as reciprocity among states in respect of rights and duties, the equality and equal recognition of states, and good faith in international agreements, that were identified and affirmed by the secular natural law thinkers as fundamental principles of the law of nations which remained distinct from the sphere of positive law. That this is so should serve to confirm the abiding relevance of the work of the secular natural law thinkers in the understanding of modern international law, and, in line with what is argued in the present paper, to confirm also the proper credentials of Pufendorf as a leading secular natural law thinker for a place within the tradition of modern international law. [88]

Notes

1. Hugo Grotius: *De Jure Praedae Commentarius*, translation of the original manuscript of 1604 by Gwladys L. Williams with the collaboration of Walter H. Zeydel, The Classics of International Law, No. 22, Volume 1 (Oxford: Clarendon Press, 1950); *De Jure Belli ac Pacis Libri Tres* (1646 edition), trans. Francis W. Kelsey et al., The Classics of International Law, No. 3, Volume 2 (Oxford: Clarendon Press, 1925). Cited hereafter as *JP* and *JBP* respectively. On Grotius in relation to the modern natural law tradition, see: Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), Chapters 3 and 8; *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press, 1993), Chapter 5. For collections of articles bringing out the central importance of Grotius in relation to modern international law and international relations, see: *Hugo Grotius and International Relations*, ed. Hedley Bull, Benedict Kingsbury and Adam Roberts (Oxford: Clarendon Press, 1990); *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius*, ed. Yasuaki Onuma (Oxford: Clarendon Press, 1993).
2. Samuel Pufendorf: *Elementorum Jurisprudentiae Universalis Libri Duo* (1672 edition), trans. W.A. Oldfather, The Classics of International Law, No.

15, Volume 2 (Oxford: Clarendon Press, 1931); *De Jure Naturae et Gentium Libri Octo* (1688 edition), trans. C.H. and W.A. Oldfather, The Classics of International Law, No. 17, Volume 2 (Oxford: Clarendon Press, 1934); *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1682 edition), trans. Frank Gardner Moore, The Classics of International Law, No. 10, Volume 2 (New York: Oxford University Press, 1927). Cited hereafter as *EJU, JNG* and *OHC* respectively. On the political thought of Pufendorf generally, see: Leonard Krieger, *The Politics of Discretion: Pufendorf and the Acceptance of Natural Law* (Chicago and London: University of Chicago Press, 1965). On Pufendorf in regard to theorizing about international law and international politics, see: Andrew Linklater, *Men and Citizens in the Theory of International Relations* (1982), 2nd edition (London: Macmillan, 1990), Chapter 4; David Boucher, *Political Theories of International Relations: From Thucydides to the Present* (Oxford: Oxford University Press, 1998), Chapter 10; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999), Chapter 5.

3. Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 edition), trans. Joseph H. Drake, The Classics of International Law, No. 13, Volume 2 (Oxford: Clarendon Press, 1934). Cited hereafter as *JGMSP*.
4. Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758 edition), trans. Charles G. Fenwick, The Classics of International Law, No. 4, Volume 3 (Washington, DC: Carnegie Institution of Washington, 1916). Cited hereafter as *DG*. On Vattel's exposition of the law of nations, see: Charles G. Fenwick, 'The Authority of Vattel', *American Political Science Review*, 7 (1913), 395-410, 8 (1914), 375-92; Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's Le Droit des Gens* (Dobbs Ferry, New York: Oceana, 1975).
5. On Hobbes as a denier of international law, see: Arthur Nussbaum, *A Concise History of the Law of Nations*, 2nd edition (New York: Macmillan, 1954), Chapter 5, pp. 144-7. It should be noted that while Nussbaum did not present Pufendorf as a denier of international law, he still very much emphasized that for Pufendorf, as much as for Hobbes, international law was not of primary concern, and that in what Pufendorf did have to say about the subject the influence of Hobbes was stronger than that of Grotius. *A Concise History of the Law of Nations*, Chapter 5, pp. 147-50.

6. For Grotius on the law of nature as a law of self-defence, and on the natural right of men to defend themselves and their property and personal rights as the foundation for the right of private war, see particularly: *JBP*, Book I, Chapter II, Section I; Book I, Chapter III, Sections I-II. See also the Prolegomena to *De Jure Praedae* for what Grotius specified as the first and second fundamental laws of nature: *JP*, Chapter II: Prolegomena, pp. 10-12.
7. Grotius, *JBP*, Prolegomena, Section 6.
8. For Grotius on these foundational principles of the law of nature, see: *JBP*, Prolegomena, 8. For a parallel statement and explanation of the same, see: *JP*, II: Prolegomena, pp. 13-18.
9. In this connection, see, for example, Grotius' argument to the effect that by the law of nature subjects in the state were not to be thought of as having a right to resist their rulers. *JBP*, I.IV.II. Regarding the principles of the law of nature that, for Grotius, provided for the subjection of men to states, to judicial procedures for the resolution of disputes about rights, and to institutions of civil government, see also: *JP*, II: Prolegomena, pp. 19-26.
10. Grotius, *JBP*, I.I.X.
11. Ibid., I.I.XIII.
12. Ibid., I.I.XIV.
13. For Grotius on the origin of the state, and on the legal order specific to the state, in pacts (and so in the acts of consent and agreement embodied in these), see: *JBP*, Prolegomena, 15-16. See also: *JP*, II: Prolegomena, pp. 18-20.
14. Regarding Grotius on the just causes of war, see: *JBP*, II.I.I-II.
15. For Grotius on the principle of pacts as implying the principle of good faith, and for his explanation of the principle of good faith as basing the law applying in the international sphere, see particularly: *JP*, II: Prolegomena, pp. 18-19, 26-7.
16. For Grotius on public war and the conditions for it, see: *JBP*, I.III.I, IV; III. III.
17. Grotius, *JBP*, II.XVIII.
18. Ibid., II.XIX.
19. Ibid., III.II.
20. For Grotius on the rights of the parties to public war, see: *JBP*, III.IV-IX.
21. For Grotius on the relevant principles of good faith, see: *JBP*, III.XIX-XXIV.
22. Grotius, *JBP*, Prolegomena, 17.
23. For Grotius on this distinction as between the law of nature and the law of

nations in relation to the rights of war, see: *JBP*, III.I.I.

24. Thus Grotius held that a public war had certain effects which did not follow from the nature of war itself. *JBP*, III.IV.I. The rights of parties to public war, as recognized from the standpoint of the law of nations, were for Grotius effects in this sense, and were explained by him as such from Chapter 4 to Chapter 9 of Book III of *De Jure Belli ac Pacis*.
25. Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, ed. Michael Oakeshott (Oxford: Basil Blackwell, 1946). For a statement of position by the present author as regards Hobbes and the view that he took of the law of nations, see: Charles Covell, 'Hobbes, Natural Law and the Law of Nations', *Historia Juris*, 9 (March 2001), pp. i-xlviii.
26. For Hobbes on the condition of universal war obtaining among men by nature, and on the laws of nature as comprising the principles of peace relating to the ends of self-preservation and social order, see: *Leviathan*, Part I, Chapters XIII-XV.
27. Concerning Hobbes on the establishing of states and the submission by men to the sovereign authorities established in states, on the rights and powers of sovereign rulers, and on the attributes of civil law as the form of human positive law, see: *Leviathan*, II.XVII-XVIII, XXVI.
28. For Hobbes's specification of the law of nations as consisting of the laws of nature, see: *Leviathan*, II.XXX, pp. 231-2.
29. For Pufendorf on the law of nature, see: *JNG*, Book II, Chapter III; *OHC*, Book I, Chapter III.
30. There is no separate discussion in *De Jure Naturae et Gentium* of the duties owed by men to God under natural law. For Pufendorf's specification of this set of natural duties, see: *OHC*, I.IV.
31. Pufendorf, *JNG*, II.IV; *OHC*, I.V, Sections 1-4.
32. It should be noted that, for Pufendorf, the right of self-defence was a foundational natural right in the respect that there was no criminal liability attaching to killing in the context of acts of innocent defence. For Pufendorf on the natural right of self-defence, see: *JNG*, II.V; *OHC*, I.V.5-17.
33. Pufendorf, *JNG*, II.VI; *OHC*, I.V.18-24.
34. Regarding the distinction that Pufendorf drew between absolute and hypothetical duties owed under natural law, see: *JNG*, II.III, Section 24; III.I, Section 1; *OHC*, I.VI.1
35. For Pufendorf on the natural law principles relating to the duty falling on

men to refrain from infringing the rights of one another, and to make all proper restitution for rights violations, see: *JNG*, III.I; *OHC*, I.VI.

36. Pufendorf, *JNG*, III.II; *OHC*, I.VII.
37. The common duties of humanity, as Pufendorf expounded them, included the duties essential for the protection of visitors to foreign lands, and for the maintenance of proper trade and commerce among men under the conditions of the market. For Pufendorf's elaboration of this part of the law of nature, see: *JNG*, III.III; *OHC*, I.VIII.
38. For Pufendorf on the law of and the principles relating to agreements, and on the duty of good faith, see generally: *JNG*, III.IV-IX; *OHC*, I.IX.
39. Pufendorf, *JNG*, III.IV.9; *OHC*, I.IX.4. It should be noted, in connection with this, that Pufendorf held that an imperfect promise was a promise where the promisor placed himself under an obligation, but where there was no right transferred to another man to require or compel performance of what was promised. A perfect promise, on the other hand, was a promise where the promisor obligated himself, and, at the same time, transferred a right to the promisee, or promisees, to require or compel performance of the terms of the promise. *JNG*, III.V.6-7; *OHC*, I.IX.6-7.
40. Pufendorf, *JNG*, III.IX.8; *OHC*, I.IX.22.
41. Regarding the various duties that Pufendorf saw as bound up with the institution of language, see: *JNG*, IV.I; *OHC*, I.X.
42. For Pufendorf on these and other related aspects of property ownership, see: *JNG*, IV.III-XII; *OHC*, I.XII.
43. Hence, for Pufendorf, ownership gave rise to the general duty falling on men to respect the possessions of one another, in respect of which duty theft and related crimes against property were to be strictly forbidden. Also included, here, was the duty falling on men to restore the property of others to them where such property had been innocently taken and held. For Pufendorf on the various duties brought into being through ownership in things, see: *JNG*, IV.XIII; *OHC*, I.XIII.
44. Pufendorf, *JNG*, V.I; *OHC*, I.XIV.
45. For Pufendorf on the various forms of contractual agreement relating to matters of property ownership and value, see: *JNG*, V.II-X; *OHC*, I.XV.
46. Pufendorf, *JNG*, V.XI; *OHC*, I.XVI.
47. Regarding Pufendorf on the condition of men in the state of nature, see: *JNG*, II.II (and V.XIII.2); *OHC*, II.I.
48. Here, Pufendorf argued that the establishing of the state was requisite,

given that peace among men was not to be secured solely on the basis of their respect for the law of nature, or through an agreement on their part to submit disputes to arbitration. For Pufendorf's discussion of the causes leading to the establishment of states, see: *JNG*, VII.I; *OHC*, II.V.

49. Pufendorf, *JNG*, VII.II; *OHC*, II.VI.
50. For Pufendorf's specification of the rights and powers of sovereignty in the civil state, see: *JNG*, VII.IV; *OHC*, II.VII.
51. Pufendorf, *JNG*, VII.V; *OHC*, II.VIII.
52. As regards the defining characteristics of sovereignty that Pufendorf identified, see: *JNG*, VII.VI; *OHC*, II.IX. It should be noted that Pufendorf wrote of certain general duties that he saw as belonging to the office of the sovereign ruler. Among these were the duty falling on the ruler to act for the peace and safety of the state and its subjects, the duty to enact appropriate laws and to ensure their proper enforcement, and the duty to apply punishments with justice and reason. However, the duties that Pufendorf assigned to the sovereign ruler must not be taken as qualifying the characteristics of supremacy, non-accountability and exemption from obligation under civil law which he held to be intrinsic to state sovereignty as such. For Pufendorf on the duties of sovereigns, see: *JNG*, VII.IX; *OHC*, II.XI.
53. Pufendorf, *JNG*, VIII.I; *OHC*, II.XII. See also, in this connection, Pufendorf on the right of punishment in the state: *JNG*, VIII.III; *OHC*, II.XIII.
54. In discussion of these matters, Pufendorf set down the principles governing the law of war as such, the principles governing pacts and agreements relating to war, and those governing pacts and agreements which served to restore peace. *JNG*, VIII.VI-VIII; *OHC*, II.XVI.
55. Regarding Pufendorf's exposition of the principles governing state treaties, see: *JNG*, XIII.IX; *OHC*, II.XVII.
56. For Pufendorf on the natural condition of society obtaining among states and rulers in the international sphere, see: *JNG*, II.II.4; *OHC*, II.I.6.
57. Regarding the identity of the law of nations and the natural law, Pufendorf put the matter thus in *Elementorum Jurisprudentiae Universalis*: 'Something must be added now also on the subject of the *Law of Nations*, which, in the eyes of some men, is nothing other than the law of nature, in so far as different nations, not united with another by a supreme command, observe it, who must render one another the same duties in their fashion, as are prescribed for individuals by the law of nature. On this point there is no reason for our conducting any special discussion here, since what we re-

count on the subject of the law of nature and of the duties of individuals, can be readily applied to whole states and nations which have also coalesced into one moral person. Aside from this law, we are of the opinion that there is no law of nations, at least none which can properly be designated by such a name.' *EJU*, Book I, Definition XIII, paragraph 24, p. 165. For a further statement of this position by Pufendorf where he expressly cited Hobbes as an authority, and where he expressly denied that there was a voluntary or positive law of nations with the force of law proper, see: *JNG*, II.III.23, p. 226.

58. For the text of the Charter of the United Nations (1945), see: *Basic Documents in International Law*, ed. Ian Brownlie, 4th edition (Oxford: Clarendon Press, 1995), pp. 1-35. On the right of self-defence and its place in international law, see for example: D.W. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), especially Chapter 1 for discussion of the nature of the right and Chapter 2 for elaboration of the substantive rights of states that are permissibly to be protected through resort to the means of self-defence; L.F.L. Oppenheim, *International Law*, Volume 1: Peace, 9th edition, ed. Sir Robert Jennings and Sir Arthur Watts (Harlow, Essex: Longman, 1992), Chapter 3, Section 127.
59. Regarding the law of state responsibility, see for example: Oppenheim, *International Law*, Chapter 4; Ian Brownlie, *Principles of Public International Law*, 5th edition (Oxford: Clarendon Press, 1998), Part 8, especially Chapter 21.
60. Thus the sovereign equality of states is affirmed in Article 2, paragraph 1 of the United Nations Charter, and affirmed also as the sixth fundamental principle of international law in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970). (For the text of the Declaration, see: Brownlie (ed.), *Basic Documents in International Law*, pp. 36-45.) On the sovereignty and equality of states as the founding constitutional principle of modern international law, see for example: Brownlie, *Principles of Public International Law*, Chapter 14.
61. The rule *pacta sunt servanda* is affirmed in Article 26 of the Vienna Convention on the Law of Treaties (1969), which came into force on 27 January 1980. (For the text of the Convention, see: Brownlie (ed.), *Basic Documents in International Law*, pp. 388-425.) For discussion of Article 26 of the Vienna Convention in relation to the rule *pacta sunt servanda*, see: Oppen-

heim, *International Law*, Chapter 14, Section 584; Brownlie, *Principles of Public International Law*, Chapter 26, p. 620.

62. For Wolff on the necessary law of nations, see: *JGMSP*, Prolegomena, Sections 4-6.
63. For Wolff on the stipulative and customary law of nation, see: *JGMSP*, Prolegomena, 23-24.
64. Also, for Wolff, the stipulative law of nations was based in the express consent of nations, and the customary law of nations was based in the tacit consent of nations. *JGMSP*, Prolegomena, 25.
65. Wolff, *JGMSP*, Prolegomena, 10.
66. Ibid., Prolegomena, 9, 11-15, 19.
67. Ibid., Prolegomena, 20-22. It should be noted that, for Wolff, the voluntary law of nations was not understood to proceed from the will of nations and states in the sense that nations and states determined it through their arbitrary free will. Rather, the voluntary law of nations proceeded from the will of nations and states in the sense that the will of nations and states was involved in the agreement that they were bound, as of necessity, to render to a law whose ground of derivation was already embodied in natural law. For Wolff's position on this, see: *JGMSP*, Preface, p. 6.
68. Vattel, *DG*, Introduction, Sections 6-9.
69. Regarding Vattel on the voluntary law of nations, see: *DG*, Preface, p. 10a.
70. Vattel, *DG*, Introduction 24.
71. Ibid., Introduction, 25-26.
72. Ibid., Introduction, 27.
73. Ibid., Preface, p. 9a.
74. For Vattel's arguments here, see: *DG*, Introduction, 4-5, 10-12.
75. For Wolff's arguments here, see: *JGMSP*, Prolegomena, 7-10.
76. Vattel, *DG*, Introduction, 13-14.
77. Ibid., Introduction, 15.
78. Ibid., Introduction, 18.
79. Ibid., Introduction, 17.
80. Ibid., Introduction, 20-21.
81. On the different contexts where Vattel explained the practical effects of the distinction that he drew as between the necessary law of nations and the voluntary law of nations, see: Ruddy, *International Law in the Enlightenment*, Chapter 4, pp. 110-23.
82. For Vattel on the law relating to commerce among nations and states, see

particularly: *DG*, Book I, Chapter VIII, and Book II, Chapter II.

83. Regarding the arguments of Vattel here, see: *DG*, III.XII.

84. In this connection, it should be noted that, for Vattel, it was the essential qualification for nations and states having full membership of the natural society of nations, and hence for their having status as subjects of the law of nations, that nations and states should be sovereign and independent entities. On this point, see: *DG*, I.I, Section 4.

85. The comprehensiveness of the substantive law of nations, as Vattel stated it, is easily understood through a brief review of some of the principal subject-matters falling under the different heads discussed in the four books which comprise *Le Droit des Gens*. Thus in Book 1, Vattel treated of the law of nations as it had application to nations and states considered in and by themselves. Here, Vattel considered such matters as the duties of nations and states in respect of themselves (I.II), the constitution of nations and states and the form of the sovereign power obtaining within them (I.III-V), and the principles relating to the maintenance of justice by nations and states and to their exercise of the rights and powers of public administration (I.XIII). In Book 2, Vattel turned to the law of nations as it applied to the mutual external relations among states. Included under this head were such matters as the dignity and equality of nations and states (II.III), the various effects of the rights of territorial domain belonging to them (II.VII-XI), the alliances and treaties entered into by nations and states (II.XII-XVII), and the procedures for the settlement of disputes among nations and states (II.XVIII). In Book 3, Vattel expounded the principles of the law of war, and here stating the law as it concerned, for example, the just causes of war (III.III), declarations of war (III.IV), the various aspects of neutrality (III.VII), the rights of belligerent nations and states as regards the person and property of the enemy (III.VIII-IX), conventions made by belligerents during wartime (III.XVI), and civil war (III.XVIII). Finally, there is Book 4, where Vattel expounded the law of nations as it related to procedures for the restoration of peace by belligerent nations and states (IV.II-IV), and to the principles governing embassies and the rights and immunities of ambassadors (IV.V-IX). As it will be evident from this, the exposition of the law of nations that Vattel set out in *Le Droit des Gens*, in respect of its range and detail, went far beyond the accounts of the substance of the law which had been given by Hobbes and Pufendorf.

86. Immanuel Kant, *Perpetual Peace*, in Kant, *Political Writings*, trans. H.B.

Nisbet, ed. Hans Reiss (Cambridge: Cambridge University Press, 1991), pp. 93-130 - especially pp. 102-5 for the statement and explanation by Kant of what he called the second definitive article of perpetual peace, with which article he stipulated the establishing of a federation of free states as the constitutional foundation for the law of nations. For an explanation by the present author of Kant and his view of the law of nations and its normative foundations, see: Charles Covell, *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (London: Macmillan, 1998), especially Chapters 4-6.

87. For the classic statement by Bentham of his positivist jurisprudence, see: *An Introduction to the Principles of Morals and Legislation* (1780; first published, 1789), ed. J.H. Burns and H.L.A. Hart (London: Athlone Press, 1970). See also the treatise on law that Bentham completed in 1782, but that, being left unpublished in his lifetime, was eventually published only in 1970 as the following: *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970), especially Chapters 1 and 2 for the definition and explanation of positive laws as deriving from the will of the sovereign power. For the exposition by Austin of his analysis of law as sovereign commands supported by coercive sanctions, see: *The Province of Jurisprudence Determined* (1832), ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995) - and for the specification by Austin of international law as a form of positive morality (or international positive morality) as distinct from a form of positive law, see especially Lecture 1, p. 20, Lecture 5, pp. 112, 123, 124-5, Lecture 6, p. 171.

88. Regarding the matter of general principles of law as a source for international law, it should be noted that the general principles of law recognized by civilized nations is cited as a source of the law to be applied by the International Court of Justice in Article 38, paragraph 1, section C of the Statute of the International Court of Justice. (For the text of the Statute, see: Brownlie (ed.), *Basic Documents in International Law*, pp. 438-55.) For relevant discussion of general principles of law in relation to the sources of international law, see: Oppenheim, *International Law*, Chapter 1, Sections 9, 12; Brownlie, *Principles of Public International Law*, Chapter 1, pp. 15-19.